Supreme Court, U.S.
FILED
JAN 18 2000
OFFICE OF THE CLERK

No. 99-991210

IN THE

Supreme Court of the United States

PETER NOORILY and RAYMOND P. NASTAWA,

Petitioners,

-and-

SIDNEY LEVY,

Petitioner,

-and-

WILLIAM O. DECK,

Petitioner,

v.

THOMAS & BETTS CORPORATION and EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PETER S. PEARLMAN
Counsel of Record
AUDRA DEPAOLO
COHN LIFLAND PEARLMAN
HERRMANN & KNOPF LLP
Attorneys for Petitioners
Park 80 Plaza West One
Saddle Brook, New Jersey 07663
(201) 845-9600

157243

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

124pp

QUESTION PRESENTED

Whether an employer may make discretionary decisions of plan administration regarding an ERISA severance plan, solely in its own interest as the employer and unconstrained by ERISA's fiduciary requirements, merely because those decisions affect the employer's business.

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Cited Authorities iii

Table of Appendices vi

Opinions Below 1

Statement of the Basis for Jurisdiction 1

Statutory Provisions Involved 1

Statement of the Case 3

Reasons for Granting the Writ 8

The Third Circuit's Decision Is In Direct Conflict With ERISA Law As Established By The Relevant Decisions Of This Court And By Every Other Circuit That Has Dealt With The Important Issue Presented Herein Thus Also Creating A Conflict Among The Circuits. 8

Conclusion 16

TABLE OF CITED AUTHORITIES

Page

Cases:

Abbott v. Pipefitters Local Union No. 522, 94 F.3d 236 (6th Cir. 1996), *cert. denied*, 519 U.S. 1111 (1987) 8

Anderson v. Ciba-Geigy Corp., 759 F.2d 1518 (11th Cir.), *cert. denied*, 474 U.S. 995 (1985) 8, 13

Anderson v. Resolution Trust Corp., 66 F.3d 956 (8th Cir. 1995) 8

Berger v. Edgewater Steel Co., 911 F.2d 911 (3d Cir.), *cert. denied*, 499 U.S. 920 (1990) 10, 11

Braxton v. United States, 500 U.S. 344 (1991) 8

Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73 (1995) 8

Doe v. Group Hospitalization & Medical Serv., 3 F.3d 80 (4th Cir. 1993) 14

Firestone v. Tire & Rubber Co. v. Bruch, 489 U.S. 102 (1989) 9, 10, 12, 13, 14

Hlinka v. Bethlehem Steel Corp., 863 F.2d 279 (3d Cir. 1988) 9, 11

Cited Authorities

Page

Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155 (3d Cir. 1990) 9, 10

Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 119 S. Ct. 755 (1999) 10

James v. United States, 366 U.S. 213 (1961) 8

Lockheed Corp. v. Spink, 517 U.S. 882 (1996) 8, 9, 10, 11, 12, 13

Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134 (1985) 9

Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983) .. 9

Siskind v. Sperry Retirement Program, Unisys, 47 F.3d 498 (2d Cir. 1995) 8

Systems Council EM-3 v. AT&T Corp., 159 F.3d 1376 (D.C. Cir. 1998) 8

Trenton v. Scott Paper Co., 832 F.2d 806 (3d Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988) 9

Varity Corp. v. Howe, 516 U.S. 489 (1996) 9, 13

Vartanian v. Monsanto Co., 131 F.3d 264 (1st Cir. 1997) 8, 10

Walling v. Brady, 125 F.3d 114 (3d Cir. 1997) ... 9, 10

Cited Authorities

Page

Statutes:

28 U.S.C. § 1254(1) 1

29 U.S.C. § 1002(21)(A) 2, 12, 13

29 U.S.C. § 1104(a) 2, 9, 10, 12, 13

29 U.S.C. § 1132(a)(1)(B) 2

TABLE OF APPENDICES

Page

Appendix A — Order Of The United States Court Of Appeals For The Third Circuit Amending Slip Opinion Dated And Filed October 18, 1999 .... 1a

Appendix B — Opinion And Judgment Of The United States Court Of Appeals For The Third Circuit Dated And Filed August 25, 1999 ..... 6a

Appendix C — Order For Judgment Of The United States District Court For The District Of New Jersey On Post Trial Applications Dated October 15, 1998 And Filed October 16, 1998 ..... 33a

Appendix D — Opinion Of The United States District Court For The District Of New Jersey On Plaintiffs' Post-Trial Applications Dated And Filed September 14, 1998 ..... 37a

Appendix E — Order For Judgment Of The United States District Court For The District Of New Jersey (Amended As To Para. 2) Dated August 5, 1998 And Filed August 6, 1998 ..... 48a

Appendix F — Transcript Of Proceedings Of The United States District Court For The District Of New Jersey Dated July 7, 1998 ..... 52a

Appendix G — Order Of The United States Court Of Appeals For The Third Circuit Denying Petition For Rehearing Dated October 19, 1999 ..... 96a

Petitioners, Peter Noorily, Raymond P. Nastawa, Sidney Levy and William O. Deck (collectively, "Petitioners"), respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Third Circuit is reported at *Noorily v. Thomas & Betts Corp.*, 188 F.3d 153 (3d Cir 1999) (App. A & App. B). The opinions of the United States District Court for the District of New Jersey are unpublished (App. D & App. F). A petition for rehearing was filed, and was denied on October 19, 1999 (App. G).

STATEMENT OF THE BASIS FOR JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The United States Court of Appeals for the Third Circuit issued its denial of the petition for rehearing on October 19, 1999. This petition is timely filed within 90 days of the rehearing denial.

STATUTORY PROVISIONS INVOLVED

The Employee Retirement Income Security Act ("ERISA") provides:

> (a) Persons empowered to bring a civil action. A civil action may be brought — (1) by a participant or beneficiary. . . (B) to recover benefits due to him under the terms of the plan,

> to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

29 U.S.C. § 1132(a)(1)(B).

ERISA requires that:

> . . . [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and — (A) for the exclusive purpose of (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan; (B) with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. . . .

29 U.S.C. § 1104(a).

ERISA provides that:

> . . . a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets. . .or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan . . . .

29 U.S.C. § 1002(21)(A).

STATEMENT OF THE CASE

The Third Circuit's decision in this case ignores the express language of the controlling statute, places it in conflict with controlling precedent of this Court and with every other circuit which has dealt with this subject. It essentially destroys ERISA's protection for employees' right to severance benefits, one of the purposes for which ERISA was enacted. The decision allows employers — in the Third Circuit only — to ignore their ERISA mandated fiduciary obligations to their employees merely because it is in the employers' business interests to do so. A brief review of the virtually uncontradicted factual and procedural background of this case is helpful in understanding the significance of the important issue presented.

Each of the Petitioners was employed as an engineer in Thomas & Betts Corporation's ("T&B" or the "Company") electrical division in northern New Jersey for periods ranging from 17 to 25 years. In December 1991, T&B merged with a company then known as American Electric. As a result of that merger, T&B decided to move its engineering department to Memphis, Tennessee.

A number of meetings were held in early December 1991, during which T&B's employees, including Petitioners, were told by T&B executives that, due to the relocation of the division, if they did not move to Memphis they could no longer remain employees of T&B. They were repeatedly reassured, however, that in accordance with the Company's plan and its past business practices, if they did not move they would receive the severance benefits available to all T&B employees whose employment was involuntarily terminated.

When faced with the prospect of picking up their families and moving over 700 miles, most of the engineers elected not to go. T&B's response was as heavy-handed as it was swift. T&B announced that it would not pay the severance due to those employees who did not move. At first, that threat was aimed at pressuring the engineers into changing their minds. When that failed, it became a punishment, with management taking out its frustrations by depriving those long-term employees of the right which they had accrued through their years of devoted service.

The reasons that each of the Petitioners found it impossible to move to Memphis were compelling.

In January 1992, Mr. Noorily was 61 years of age and had been employed by T&B for over 22 years. He and his wife were responsible for caring for both his aged mother and his mother-in-law who was almost bedridden by arthritis.

Mr. Nastawa was 45 years of age and had been employed by T&B for over 17 years. He and his wife then cared for his mother-in-law who had Parkinson's disease and an amputated leg, his wife had a career position in the New Jersey area which she could not give up and his children were established in the school system.

Mr. Levy was 59 years of age and had been employed by T&B for over 20 years. He and his wife then cared for his mother-in-law who had breast cancer, diabetes, cataracts and other medical problems, both had lived in or near New Jersey for many years and they had two children, three grandchildren, and all of their relatives and friends in and near New Jersey.

Mr. Deck was 59 years of age and had been employed by T&B for over 25 years. He was then caring for his mother who was eighty-five years-old, and was partially blind as a result of macular degeneration.

T&B declined to give any of the Petitioners any guarantee of continued employment if they moved to Memphis, and each was acutely aware of the fact that the Company had a significant number of lay-offs in the engineering department, which had shrunk in size dramatically during the tenure of their employment.

Indeed, T&B sent each of the Petitioners a memoranda which contained a note expressly reminding them that they were, and would continue to be, at-will employees: "there is no guarantee that you will continue to work for Thomas & Betts until you are 65 years old, nor is there any guarantee that the terms of the aforementioned plans will not change. You must remember that the employment relationship in our Memphis operation is an at-will relationship. . . ." Petitioners were thus justifiably concerned that they could wind up in Memphis without jobs, after having sold their homes, uprooted their families and left their roots behind.

When Petitioners' employment was terminated, they sought the benefits due them under T&B's severance plan. However, despite the Company's long standing practice, its earlier assurances to Petitioners and its determination to pay severance benefits to all other employees in connection with this move, T&B refused to pay those benefits to Petitioners and five other engineers.

In making its decision, T&B acted solely out of its own business interests and with total disregard for the interests of the Petitioners, the beneficiaries of its severance plan.

Petitioners filed these actions in the United States District Court for the District of New Jersey, seeking to recover severance benefits due to them under defendant Employee Benefit Plan of Thomas & Betts Corporation provided by T&B.

After a five-day bench trial in June 1998, the Honorable Katharine S. Hayden, U.S.D.J. held that: Petitioners had been constructively discharged; T&B had breached its fiduciary duties under ERISA; and T&B had acted arbitrarily and capriciously in denying severance benefits to Petitioners. Based upon these holdings, the judge awarded Petitioners their severance benefits due under the plan (App. F). The judge also requested that the parties file additional papers on Petitioners' request for prejudgment interest, attorneys' fees and costs.

On August 6, 1998, Judge Hayden entered an order for judgment in favor of Petitioners, as follows: Peter Noorily in the amount of $70,621.80; Raymond P. Nastawa in the amount of $23,247.81; William O. Deck in the amount of $57,001.00 and Sidney Levy in the amount of $103,453.80 (App. E).

T&B filed a timely notice of appeal from that judgment on September 4, 1998 (Docket No. 98-6298), and Petitioners filed a timely cross appeal on September 14, 1998 (Docket No. 98-6328).

On October 19, 1998, Judge Hayden awarded Petitioners prejudgment interest from their respective last dates of employment, as well as attorneys' fees and costs (App. C & App. D). T&B filed a notice of appeal from that judgment on October 27, 1998 (Docket No. 98-6432). On December

9, 1998, the United States Court of Appeals for the Third Circuit consolidated the appeals.

On August 25, 1999, the United States Court of Appeals for the Third Circuit reversed the judgments entered by the district court on August 6, 1998 and October 19, 1998, affirmed the order of August 17, 1995, and remanded the case to the district court for entry of a judgment in favor of T&B (App. B).

Petitioners filed a motion for an extension of time to file their petition for rehearing, which was granted, as well as a petition for rehearing and rehearing *en banc*. The United States Court of Appeals for the Third Circuit denied rehearing on October 19, 1999 (App. G), but amended its August 25, 1999 opinion on October 18, 1999 (App. A).

Petitioners now file this timely petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

THE THIRD CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH ERISA LAW AS ESTABLISHED BY THE RELEVANT DECISIONS OF THIS COURT AND BY EVERY OTHER CIRCUIT THAT HAS DEALT WITH THE IMPORTANT ISSUE PRESENTED HEREIN THUS ALSO CREATING A CONFLICT AMONG THE CIRCUITS.

The opinion of the Third Circuit in this case is in direct conflict with ERISA law as established by this Court and by every other circuit that has dealt with the important issue presented here. *See, e.g., Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995); *Systems Council EM-3 v. AT&T Corp.*, 159 F.3d 1376, 1379 (D.C. Cir. 1998); *Vartanian v. Monsanto Co.*, 131 F.3d 264, 268 (1st Cir. 1997); *Abbott v. Pipefitters Local Union No. 522*, 94 F.3d 236, 239 (6th Cir. 1996), *cert. denied*, 519 U.S. 1111 (1987); *Anderson v. Resolution Trust Corp.*, 66 F.3d 956, 960 (8th Cir. 1995); *Siskind v. Sperry Retirement Program, Unisys*, 47 F.3d 498, 505 (2d Cir. 1995); *Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518, 1520-22 (11th Cir.), *cert. denied*, 474 U.S. 995 (1985). Thus, this petition should be granted because the Third Circuit's decision conflicts with relevant decisions of this Court, *see, e.g., James v. United States*, 366 U.S. 213, 215 (1961), and also creates a split among the circuit courts. *See, e.g., Braxton v. United States*, 500 U.S. 344, 347 (1991).

The court of appeals' determination that T&B was not acting as a fiduciary when it exercised its discretion to deny severance to Petitioners, virtually eviscerates the fiduciary obligations of employers acting as plan administrators.

Instead the court below established, in the Third Circuit alone, a standard which permits an employer to make decisions of plan administration solely in its own interest as the employer, so long as it will benefit the company's business to do so.

The fundamental purpose of ERISA is to protect the interests of employees and their beneficiaries in employee benefit plans by safeguarding contractually defined benefits, not to create an avenue for employers to avoid their contractual obligations to their employees. *Firestone v. Tire & Rubber Co. v. Bruch*, 489 U.S. 102, 113 (1989) (*citing Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983) and *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985)). In furtherance of this goal, ERISA established standards of conduct, responsibility and obligation for plan fiduciaries, *Varity Corp. v. Howe*, 516 U.S. 489, 513 (1996), and directed the fiduciaries to perform their duties "solely in the interest of the participants and beneficiaries." *Id.* (*citing* 29 U.S.C. § 1104(a)).

The law is settled that where an employer makes a decision to adopt, modify, amend or terminate an ERISA plan, it functions as a settlor and is not acting as a fiduciary and, thus, may act in accord with its own interests — including its business interests. *See Lockheed*, 517 U.S. at 890; *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1162 (3d Cir. 1990); *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 285 (3d Cir. 1988); *Trenton v. Scott Paper Co.*, 832 F.2d 806, 809 (3d Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988). In those cases, the employer is "alter[ing] the terms of," *Lockheed*, 517 U.S. at 890, "redesigning" or "tinkering with the plan document itself." *Walling v. Brady*, 125 F.3d 114, 119-20 (3d Cir. 1997). ERISA's fiduciary requirements

are not implicated when the employer, acting as the plan's settlor, makes a decision regarding the form or structure of the plan. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, —, 119 S. Ct. 755, 763 (1999).

However, the law is uniform — except, apparently in the Third Circuit — that where an employer exercises discretion in the administration of an existing plan, it acts as a fiduciary and, thus, owes both an undivided duty of loyalty, as well as a duty of good faith to covered employees. *Lockheed*, 517 U.S. at 890; *Firestone*, 489 U.S. at 113; *Vartanian*, 131 F.3d at 268; *Walling*, 125 F.3d at 120; *Hozier*, 908 F.2d at 1159; *Berger v. Edgewater Steel Co.*, 911 F.2d 911, 919 (3d Cir.), *cert. denied*, 499 U.S. 920 (1990); *see also* 29 U.S.C. § 1104(a).

The trial court found that T&B did not change or amend the severance plan itself (App. F at 77a). Rather, the Company's decision to apply its severance plan to deny benefits to a few employees while paying it to all other employees "was an act of welfare plan administration" (App. F at 79a). Thus, applying settled ERISA law, the court held that T&B "had a fiduciary duty to administer the plan with the benefit of the employees in mind and not its own management welfare" (App. F at 79a).

Although the court of appeals conceded that T&B's conduct here did not involve the adoption, modification, amendment or termination of the plan, *i.e.*, settlor functions, but rather involved the administrative decision of whether to pay severance under the plan as written, it nonetheless made the unprecedented determination that T&B had no fiduciary responsibility to the Petitioners (App. A at 4a & App. B at 17a).

The court below reached its decision by establishing a new standard which exempts "making business decisions" from ERISA's administrative functions. (App. A at 4a & App. B at 17a) ("the employer acts as a fiduciary when administering a plan but not when designing a plan *or making business decisions*") (emphasis added). This standard is wholly contrary to the established law as articulated by this Court, *Lockheed*, 517 U.S. at 890, and by every other circuit court which has spoken on the subject.

The Third Circuit impermissibly extended its prior decisions in which plan administrators had no discretion because they were expressly required by the written terms of the plan to place the employer's business interests first. *See, e.g., Hlinka*, 863 F.2d at 283 & 286 (because the plan stated that the employees could retire early "so long as the company deems such retirement to be in 'its interest,' " the plan gave administrator "no element of discretion"); *Berger v. Edgewater Steel Co.*, 911 F.2d at 914 n.2 & 919 (as the plan provided that employees could retire early only if "the Company considers that such retirement would likewise be in its interest, . . . the Plan itself did not give the fiduciary discretionary authority to determine eligibility for benefits . . . and the Plan required [the administrator] to accept the employer's decision").

Based on the mandatory language of the plans in *Hlinka* and *Berger* and the corresponding lack of discretion, the administrators in those cases would have breached their duties if they had not abided by the employer's business interests. *Hlinka*, 863 F.2d at 286; *Berger*, 911 F.2d at 919.

Unlike those cases, however, the plan here grants discretion to the administrator and does not contain a mandate

that — or even permit — the administrator to consider and/or abide by T&B's business interests when exercising that discretion in determining whether to pay severance. Indeed, the law as established by this Court requires that the administrator exercise its discretion as a fiduciary to the plan participants. *Lockheed*, 517 U.S. at 890; *Firestone*, 489 U.S. at 113. Thus, it was arbitrary, capricious and a breach of its fiduciary duties for T&B to act in its own interest, rather than in the interest of the participants when administering its severance plan.

The Third Circuit has established a new rule, unprecedented legally and unjustifiable from a policy standpoint. This new rule provides that any time an employer/plan administrator uses its discretion to make a decision which has business implications, it is unconstrained by fiduciary duties to the covered employees. Thus, where the employer exercises its discretion to deny severance based upon a business consideration, it will not be deemed to owe the plan participants any fiduciary duty. This proposition is contrary to ERISA's express statutory language, 29 U.S.C. § 1002(21)(A), § 1104(a), this Court's decision in *Lockheed*, 517 U.S. at 890 (employer is a fiduciary when exercising "discretionary authority" granted under the plan), and the decisions of every circuit which has spoken on the subject.

ERISA law is settled that a

> person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, . . . , or (iii) he has any discretionary

> authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A); *Firestone*, 489 U.S. at 113.

The fiduciary duties under § 1104(a) attach to employers, such as T&B, who serve as plan administrators "to the extent [they] exercise [ ] any discretionary authority or control" under the plan. *Firestone*, 489 U.S. at 113. Thus, an executive of a corporation who decides that an employee is not entitled to severance is acting "as a fiduciary when making his no severance pay determination," regardless of "his title or whether he was named as a fiduciary." *Anderson*, 759 F.2d at 1522.

Likewise, the decision made by T&B's then CEO to classify a small group of employees (including Petitioners) as "key" or "critical" employees (a classification that nowhere exists in the plan itself) and, thus, treat them differently under T&B's severance plan constituted a decision about, or an act of, plan administration. In making that decision, the CEO, himself, conceded that he was exercising discretionary authority or responsibility in the management or administration of T&B's severance plan (I "understood that I had the flexibility and discretion to apply the policy, and particularly to apply the severance where it was appropriate or where it was not appropriate").

Because, as the Third Circuit conceded, T&B was clearly exercising discretion in the administration of its severance plan, the law mandates that T&B's decision to deny severance to Petitioners had to be made "solely with the interests of the covered employees in mind." *Lockheed*, 517 U.S. at 890; *Varity Corp.*, 516 U.S. at 513. The trial court

correctly found that T&B's decision to deny severance to a small group of employees, while paying it to all other employees who declined to relocate in accordance with the Company's plan, clearly was not made "solely with the interests of the covered employees in mind."

Additionally, when determining whether a denial of benefits is arbitrary and capricious, a court also may consider an ERISA administrator's conflicts of interest as a factor. *Firestone*, 489 U.S. at 115 ("if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion' ")). Hence, when a plan administrator is exercising discretion, under a conflict of interest, any deference to which his decision is entitled "will be lessened to the degree necessary to neutralize any untoward influence resulting from the conflict." *See, e.g., Doe v. Group Hospitalization & Medical Serv.*, 3 F.3d 80, 87 (4th Cir. 1993).

In this case it is beyond dispute that T&B's CEO was operating under a conflict of interest. Unfortunately, and contrary to law, he "resolved" this conflict by acting only in T&B's interest, and entirely ignoring the interest of the plan participants. Indeed, the trial court found that T&B's decision was based on "punitive coercive motives designed solely to protect and benefit the employer to the detriment of plaintiffs" (App. F at 86a).

Arbitrarily denying severance benefits to Petitioners, while at the same time granting it to all other employees in no way furthered the purpose of T&B's severance plan, which was to "provide a schedule of severance pay and

benefits continuation in the event of an involuntary termination."

It is the fiduciary duty to these long term plan participants, which exists by statute, by this Court's mandate and in every other circuit, that the Third Circuit has now eliminated by exempting "discretionary business decisions" from ERISA's administrative functions. The Third Circuit's decision eradicates the fiduciary obligations of employers acting as ERISA plan administrators, by allowing the employer to make decisions of plan administration solely in its own interest as the employer, so long as its decisions benefit the company's business.

Because the decision allows employers in the Third Circuit to ignore ERISA's fiduciary standards of conduct, responsibility and obligation, it provides the employers with a method of circumventing their contractual obligations, thereby leaving employees in the Third Circuit alone without any protection whatsoever. Thus, it is imperative that this Court take action to restore ERISA's protection to employees in the Third Circuit, by reaffirming that ERISA's fiduciary obligations attach to all discretionary decisions of plan administration.

CONCLUSION

For all of the above reasons, Petitioners respectfully request that their petition for a writ of certiorari be granted.

Respectfully submitted,

PETER S. PEARLMAN
Counsel of Record
AUDRA DEPAOLO
COHN LIFLAND PEARLMAN
HERRMANN & KNOPF LLP
Attorneys for Petitioners
Park 80 Plaza West One
Saddle Brook, New Jersey 07663
(201) 845-9600

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AMENDING SLIP OPINION DATED AND FILED OCTOBER 18, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 98-6298, 98-6328,
and 98-6432

PETER NOORILY; RAYMOND P. NASTAWA

v.

THOMAS & BETTS CORPORATION; EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION

(D.C. Civil No. 93-2227)

SIDNEY LEVY

v.

THOMAS & BETTS CORPORATION; EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION

(D.C. Civil No. 93-2228)

WILLIAM O. DECK

v.

Appendix A

THOMAS & BETTS CORPORATION; EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION

(D.C. Civil No. 93-2229)

Thomas & Betts Corporation; Employee Benefit Plan of Thomas & Betts Corporation,

Appellants in No. 98-6298

PETER NOORILY; RAYMOND P. NASTAWA

v.

THOMAS & BETTS CORPORATION; EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION

(D.C. Civil No. 93-2227)

SIDNEY LEVY

v.

THOMAS & BETTS CORPORATION: EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION

(D.C. Civil No. 93-2228)

WILLIAM O. DECK

v.

Appendix A

THOMAS & BETTS CORPORATION; EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION

(D.C. Civil No. 93-2229)

Peter Noorily; Raymond P. Nastawa;
Sidney Levy; William O. Deck,

Appellants in No. 98-6328

PETER NOORILY; RAYMOND P. NASTAWA

v.

THOMAS & BETTS CORPORATION; EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION

(D.C. Civil No. 93-2227)

SIDNEY LEVY

v.

THOMAS & BETTS CORPORATION; EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION

(D.C. Civil No. 93-2228)

WILLIAM O. DECK

v.

Appendix A

THOMAS & BETTS CORPORATION; EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION

(D.C. Civil No. 93-2229)

Thomas & Betts Corporation; Employee Benefit Plan of Thomas & Betts Corporation,

Appellants in No. 98-6432

BEFORE: GREENBERG and ALITO, *Circuit Judges*, and STAFFORD,* *District Judge*

ORDER AMENDING SLIP OPINION

The slip opinion filed August 25, 1999 in the above case is hereby amended as follows:

1. On page 9 the last complete paragraph which starts "In sum" and ends "an ERISA case." is deleted.

2. In place of the deleted paragraph the following paragraph is inserted:

> In sum, then, the employer acts as a fiduciary when administering a plan but not when designing or making business decisions allowed for by a plan, even though in all three situations its determinations may impact on its employees.

---

* Honorable William H. Stafford, Jr., Senior Judge of the United States District Court for the Northern District of Florida, sitting by designation.

Appendix A

By the Court:

/s/ Morton I. Greenberg
Circuit Judge

DATED: October 18, 1999

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED AUGUST 25, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 98-6298, 98-6328,
and 98-6432

PETER NOORILY; RAYMOND P. NASTAWA

v.

THOMAS & BETTS CORPORATION; EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION

(D.C. Civil No. 93-2227)

SIDNEY LEVY

v.

THOMAS & BETTS CORPORATION; EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION

(D.C. Civil No. 93-2228)

WILLIAM O. DECK

v.

Appendix B

THOMAS & BETTS CORPORATION; EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION

(D.C. Civil No. 93-2229)

Thomas & Betts Corporation; Employee Benefit Plan of Thomas & Betts Corporation,

Appellants in No. 98-6298

PETER NOORILY; RAYMOND P. NASTAWA

v.

THOMAS & BETTS CORPORATION; EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION

(D.C. Civil No. 93-2227)

SIDNEY LEVY

v.

THOMAS & BETTS CORPORATION; EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION

(D.C. Civil No. 93-2228)

WILLIAM O. DECK

v.

Appendix B

THOMAS & BETTS CORPORATION; EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION

(D.C. Civil No. 93-2229)

Peter Noorily; Raymond P. Nastawa;
Sidney Levy; William O. Deck,

Appellants in No. 98-6328

PETER NOORILY; RAYMOND P. NASTAWA

v.

THOMAS & BETTS CORPORATION; EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION

(D.C. Civil No. 93-2227)

SIDNEY LEVY

v.

THOMAS & BETTS CORPORATION; EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION

(D.C. Civil No. 93-2228)

WILLIAM O. DECK

v.

Appendix B

THOMAS & BETTS CORPORATION; EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION

(D.C. Civil No. 93-2229)

Thomas & Betts Corporation; Employee Benefit Plan of Thomas & Betts Corporation,

Appellants in No. 98-6432

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 93-02227/28/29)
District Judge: Honorable Katharine S. Hayden

Argued: July 15, 1999

BEFORE: GREENBERG and ALITO, *Circuit Judges*, and STAFFORD,* *District Judge*

(Filed: August 25, 1999)

* * *

---

* Honorable William H. Stafford, Jr., Senior Judge of the United States District Court for the Northern District of Florida, sitting by designation.

Appendix B

OPINION OF THE COURT

GREENBERG, *Circuit Judge.*

I. *FACTUAL AND PROCEDURAL HISTORY*

A. *Introduction*

This matter comes on before this court in this action under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, on the defendants' appeal from orders of the district court entered August 6, 1998, awarding severance benefits and October 19, 1998, awarding the plaintiffs attorney's fees and prejudgment interest. In addition, the matter is before this court on the plaintiffs' cross-appeal from an order entered August 17, 1995, dismissing plaintiffs' appeal to the district court from a magistrate judge's order imposing sanctions on the plaintiffs and from a subsequent order of the district court on June 23, 1998, expanding the sanctions by precluding the plaintiffs from offering certain testimony at trial. This litigation stems from the defendant Thomas & Betts ("T&B") Corporation's decision to relocate particular business operations and employees from Bridgewater, New Jersey, to Memphis, Tennessee, and its related determination that certain employees who refused to relocate would not receive benefits under its severance plan. T&B manufactures and sells connectors, fittings and wiring accessories for the electrical and electronic industries. Plaintiffs Peter Noorily, Raymond Nastawa, Sidney Levy and William Deck were product engineers in T&B's Electrical Division in Bridgewater who refused to relocate to Memphis.

Appendix B

B. *Factual History*

In November 1991, T&B signed an agreement to acquire American Electric, a manufacturer of electrical products and accessories. Inasmuch as T&B then decided to relocate its Electrical Division to Memphis it held meetings in early December 1991 to inform its employees of the impending relocation. In at least one of these meetings T&B's management, in response to a question posed by a product engineer, stated that employees choosing not to relocate would receive severance payments from T&B's unfunded benefit plan. Additionally, Richard Lovell, then director of Human Resources in T&B's Electrical Division, told Noorily and Levy that T&B would make severance payments to employees who decided not to relocate. Plaintiffs, however, do not dispute T&B's assertion that it wanted them to relocate to Memphis and they concede that "this action does not involve any claims of discrimination." Br. at 21.

On December 6, 1991, Lovell issued a memorandum discussing T&B's severance policy in connection with the relocation. Although T&B marked the memorandum confidential and intended it merely to be a guide to managers seeking to answer employee questions, it acknowledges that the memorandum was circulated widely among the employees. The memorandum stated that T&B would deny severance benefits only to employees who left prior to the release date or who agreed to relocate and then changed their minds. Moreover, it specified that employees who chose not to relocate but who remained with T&B until the release date would receive severance payments. At that time, T&B's severance policy provided for benefits to employees who

were "involuntarily terminated" when "the terminating manager believes the granting of such pay is appropriate."

T&B's management made the statements concerning severance benefits believing that a large majority of the 35 product managers and engineers in its Electrical Division would relocate. T&B regarded their relocation as critical because it viewed its product managers and engineers as "key" employees. By the end of December 1991, however, T&B's management recognized that many of the product engineers did not want to relocate. T&B was concerned about their reluctance as it considered that the engineers' absence could affect the success of the pending merger. Moreover, T&B's management decided that it would be counterproductive to offer the engineers who refused to relocate severance benefits as the benefits themselves would encourage them not to relocate. Therefore, Kevin Dunnigan, the president of T&B, determined that any engineer whom T&B asked to relocate, but who refused, would not receive severance benefits because T&B would consider the refusal as a voluntary resignation. The plaintiffs received a memorandum on January 6, 1992, informing them of this decision but each objected to T&B's position and refused to sign an attached document indicating he was resigning. There can be no doubt that T&B's stated wish that the engineers relocate was not pretextual as T&B offered them substantial financial incentives to do so.

The plaintiffs, however, for compelling personal reasons decided not to relocate. All had longstanding ties to their communities as well as obligations to family members. Further, the plaintiffs considered their age and T&B's refusal

to guarantee them long-term work in Memphis as reasons not to relocate. Thus, Noorily was 61 years old at the time of the relocation and had worked for T&B for over 22 years. With his wife, he was responsible for caring for both his mother and mother-in-law, who was nearly bedridden. Nastawa was 45 years old in January 1992, and had worked for T&B for 17 years. He also cared for his extremely ill mother-in-law and had children attending school in New Jersey. Furthermore, his wife had an established career in the area. Levy had worked for T&B for over 20 years at the time of the relocation and was 59 years old. He and his wife provided care to his mother and mother-in-law. Finally, Deck was 59 years old at the time of the relocation and had worked for T&B for over 25 years. Like the other plaintiffs, he had significant family responsibilities as he was the primary caregiver for his ill mother. Inasmuch as the plaintiffs would not relocate, Noorily's and Nastawa's employment with T&B ended on February 14, 1992, and Deck and Levy, each of whom performed transition work for T&B, left the company in June and September 1992, respectively.

C. *Procedural History*

Noorily and Nastawa originally filed suit in the Superior Court of New Jersey alleging that T&B's refusal to pay them severance benefits was a breach of their employment contract. After T&B moved for dismissal on ERISA preemption grounds, the parties executed a stipulation of dismissal without prejudice. Then on May 19, 1993, Noorily and Nastawa filed this action as plan participants in the district court under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), against T&B and its Employee Benefit Plan

seeking benefits they claimed were due to them under T&B's severance plan.[1] Levy and Deck filed separate, similar complaints on that date in the district court. The district court consolidated the three actions in June 1997 at plaintiffs' request. As a matter of convenience we refer to the defendants simply as T&B.

On November 4, 1994, T&B moved for sanctions against plaintiffs' attorneys for having allegedly improper ex parte contacts with three former T&B employees. A magistrate judge granted the sanctions motion on December 6, 1994, and precluded plaintiffs from calling these witnesses at trial. The plaintiffs then appealed to the district court which, through Judge Bissell, on August 17, 1995, upheld the order and dismissed the plaintiffs' appeal. At the outset of the trial Judge Hayden, on T&B's motion, expanded the scope of the sanctions by prohibiting the plaintiffs and their witnesses from testifying at the trial with respect to representations by these improperly contacted employees.

The parties tried the case at a bench trial before Judge Hayden from June 23, 1998, to June 29, 1998. The court ruled in favor of the plaintiffs on July 7, 1998, in a comprehensive oral decision, finding that T&B had involuntarily terminated the plaintiffs' employment and had violated its fiduciary duty under ERISA by arbitrarily and capriciously denying them severance benefits under its severance plan. In an August 6, 1998 judgment order, the court granted the plaintiffs substantial severance benefits, which included severance pay and medical benefits according

---

1. It appears that the case could have proceeded under ERISA in the state courts. *See* ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1).

to the schedule provided in T&B's plan. On plaintiffs' post-trial motion, the court by an order of October 19, 1998, awarded them attorney's fees, costs, and prejudgment interest.

T&B has filed timely notices of appeal both from the August 6, 1998 order awarding plaintiffs severance benefits and from the October 19, 1998 order granting them attorney's fees, costs, and prejudgment interest. The plaintiffs have cross appealed from the order dismissing the appeal from the imposition of sanctions against them as well as from the determination limiting the use at trial of evidence regarding the improperly contacted employees' representations. The district court had subject matter jurisdiction under ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1), and 28 U.S.C. § 1331, and we have jurisdiction under 28 U.S.C. § 1291.

II. *DISCUSSION*

A. *Standard of review*

We exercise plenary review on this appeal because the outcome determinative historical facts are not in dispute, and we accept the district court's factual findings. Thus, this case essentially involves questions of law "with respect to the legal effect" of the severance plan. *Atacs Corp. v. Trans World Communications, Inc.*, 155 F.3d 659, 665 (3d Cir. 1998).

B. *Was T&B Acting as a Fiduciary When It Decided That It Would Not Provide the Plaintiffs with Severance Benefits Under Its Severance Plan?*

We first address T&B's contention that its determination to deny the plaintiffs severance benefits was a "business decision" immune from the standards that section 404 of ERISA, 29 U.S.C. § 1104, establishes for fiduciaries. In considering this point we note that T&B acknowledges that its severance policy was a "welfare plan" as that term is defined in ERISA § 3(1), 29 U.S.C. § 1002(1). T&B's dual role as the plan's administrator as well as the employer, however, complicates our analysis. The plan clearly reflects this dual role as it provides that "[a]ll fringe benefits covered under this policy are administered by the Corporate Benefits Committee" which consists of certain T&B officers. On the other hand, the plan provides that an award of severance pay is made when "the terminating manager believes the granting of such pay is appropriate."

When an employer makes decisions about the *design* of a welfare plan, such as a severance plan, it functions as an employer and not as an administrator and thus it is not acting as a fiduciary. *See Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 285 (3d Cir. 1988). Accordingly, an employer can create a plan that furthers its business interests, and it can act according to these interests in amending or terminating the plan. *See Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1162 (3d Cir. 1990). Moreover, to the degree that the plan gives an employer discretion, the employer is not a fiduciary when it makes determinations according to the plan's terms that affect employees' eligibility for benefits. *See Berger v.*

Edgewater Steel Co., 911 F.2d 911, 918 (3d Cir. 1990). Thus, in *Berger*, we held that the employer was not acting in a fiduciary capacity when it determined, as the plan permitted it to do, that the early retirement of certain employees was not in its best interest. *See id.* at 918-19. However, when the employer is *administering* the plan and paying out benefits, it acts as a fiduciary and must act in the interest of the plan's participants. *See Hozier*, 908 F.2d at 1158-59 (citing ERISA § 404, 29 U.S.C. § 1104, which establishes fiduciary standards under ERISA).

In sum, then, the employer acts as a fiduciary when administering a plan but not when designing or making business decisions allowed for by a plan, even though in all three situations its determinations may impact on its employees.

As we have indicated, the severance plan in this case provided T&B with discretion in determining whether to award severance benefits for it provided for an award only if the terminating manager thought that it was "appropriate" to do so. Inasmuch as the plan gave this discretion to T&B as an employer through its terminating manager rather than as an administrator through its Corporate Benefits Committee, T&B is correct in its contention that it was not acting in a fiduciary capacity when it determined that granting severance benefits to the plaintiffs would not be "appropriate" because it was not in T&B's interest to do so. Once T&B made this management determination, T&B as the administrator through its Corporate Benefits Committee was obliged to implement the decision and thus cannot be deemed to have violated its fiduciary duties by acting

according to the "employer's" determination. *See Berger*, 911 F.2d at 918-19. Similarly, if T&B as employer had determined to award severance benefits then its Corporate Benefits Committee would have been obliged to implement that decision. The district court therefore erred in concluding that T&B had breached its fiduciary duties to the plaintiffs.

Nevertheless, our conclusion that T&B did not act in a fiduciary capacity in its determination to deny severance benefits does not end the case because the plaintiffs are not suing simply for breach of fiduciary duty. Rather, their complaint and their arguments at trial and in this court show that they believe that they are entitled to benefits under the plan and that T&B misapplied the plan in denying them benefits. Thus, they have predicated their claims on breach of contract principles and, upon a proper showing, the claims could be upheld on that basis under ERISA. *See Kemmerer v. ICI Americas Inc.*, 70 F.3d 281, 287 (3d Cir. 1995). Of course, if we agree with the plaintiffs on their contract theory we can affirm even though we are rejecting the district court's reasoning that T&B violated its fiduciary obligations. *See United States v. Soberon*, 929 F.2d 935, 940 (3d Cir. 1991).[2]

C. *Does T&B's Severance Plan Entitle the Plaintiffs to Severance Benefits?*

T&B argues that in rejecting the plaintiffs' claims for severance benefits, it properly exercised the discretion the plan allowed to it. In focusing upon the discretion granted

---

2. T&B argues that plaintiffs cannot recover on contract principles as the severance plan does not create "vested contractual" rights. In view of our result we have no need to address this point.

in the plan, T&B invokes a body of case law providing that in cases brought under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), a court applies de novo review in construing an employee benefit plan unless "the benefit plan gives the administrator . . . discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Ulmer v. Harsco Corp.*, 884 F.2d 98, 101 (3d Cir. 1989) (citing *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 111, 109 S.Ct. 948, 954-55 (1989)). If the plan does grant such discretion, then a deferential standard of review is appropriate. *See Bruch*, 489 U.S. at 111-14, 109 S.Ct. at 954-57. However, these cases apply only to decisions reached by administrators or fiduciaries, not employers. As T&B itself has argued that it did not act as a fiduciary in denying benefits, it cannot now rely on this case law. Accordingly, in evaluating the plaintiffs' claims on breach of contract principles, these cases are not controlling.

The district court held that T&B terminated the plaintiffs involuntarily and that its decision to deny them benefits was arbitrary and capricious. Thus, the parties regard the court as having held that T&B "constructively discharged" plaintiffs, although in its opinion of July 7, 1998, the court did not explicitly so hold.[3] In the circumstances the parties quite naturally focus on the constructive discharge issue. But we need not review the district court's decision that the plaintiffs were involuntarily terminated because, assuming without deciding that the district court was correct on that point, the plan provides for the granting of severance pay

---

3 The court did suggest, however, during oral argument at the conclusion of the trial that a constructive discharge and an involuntary termination were the same thing. App. at 1802.

only when "*the terminating manager believes the granting of such pay is appropriate.*"

Unquestionably ERISA permits corporations to create welfare plans that give their managers wide discretion. *See, e.g., McNab v. General Motors Corp.*, 162 F.3d 959, 962 (7th Cir. 1998). Indeed, it might be possible to read T&B's plan to render unreviewable the terminating manager's decision to deny severance benefits. Nevertheless we have no reason to consider that possibility for the district court's factual findings make it clear that T&B's decision to deny plaintiffs severance benefits was not "arbitrary or capricious" and thus we must uphold it. Of course, we refer to arbitrary or capricious with respect to T&B's conduct as an employer not as a fiduciary for, as we have explained, the cases establishing a standard for reviewing a fiduciary's conduct are not controlling. Clearly, there is a class of decisions that might be arbitrary when considered from the point of view of a plan participant that are perfectly appropriate for an employer.

T&B argues that we should use a "bad faith" standard in reviewing its conduct. This argument is substantial because in *Berger*, after we rejected the application of a fiduciary standard with respect to an employer's decisions denying requests for retirement, we indicated that the employer's determination nevertheless was "subject to no more than the minimal obligation of good faith." *Berger*, 911 F.2d at 919. We are aware, however, that other courts have applied an "arbitrary and capricious" standard for judicial review in circumstances similar to those here. *See McNab*, 162 F.3d at 962. While a "bad faith" standard would be more deferential

than the "arbitrary or capricious" standard, we have no need to consider if it is applicable here as T&B did not act arbitrarily or capriciously and therefore it cannot possibly have acted in bad faith. Finally, on the standard of review issue, we point out that we cannot conceive how a court could impose a more exacting standard than that the employer's decision not be arbitrary or capricious.

The district court in reaching its result indicated that T&B's policy always has been to pay terminated employees, except those who left voluntarily, severance pay. Thus, when T&B moved its Electronic Division to South Carolina in 1990 it made severance payments to employees who declined to move.[4] The court understandably also indicated that each of the plaintiffs had a compelling personal reason to decline T&B's offer of employment in Memphis. Moreover, the court indicated that "[o]ther than the engineers in the engineering department, all employees who did not move to Memphis received severance payment[s] in accord with [T&B's] policy."

The court further stated that T&B's management considered the plaintiffs to be critical employees but that T&B was thinking of its interests rather than those of the plaintiffs' in wanting them to move to Memphis.[5] Thus, the

---

4. The Electronic Division is apparently distinct from the Electrical Division.

5. The plaintiffs contend that they were not critical to T&B and that subsequent events have demonstrated it has prospered without their services. While plaintiffs may be correct in that

(Cont'd)

court said that it was only when T&B discovered the extent of the reluctance of the engineers to move that it determined that "anyone who did not transfer his position would not receive severance and would be considered as having resigned." Yet the court recognized that T&B perceived that its employees' unanticipated decision not to relocate was threatening its decision to move its Electrical Division.

Significantly, the court made the following findings:

> The management decision in this case which isolated the engineers who declined to transfer out of all others directly affected the administration of severance to all employees who did not relocate, and as such I find that it was a breach of fiduciary duty to administer the plan.
>
> I find the act of applying the severance plan benefits to all employees, whether they were going or staying, whether they were in transition, not in transition, was an act of welfare plan administration, and in so undertaking that act I find under the [*Hozier v. Midwest Fasteners*, 908 F.2d 1155] analysis that the company had a fiduciary duty to administer the plan with the benefit of the employees in mind and not its own management welfare in mind.

(Cont'd)
assertion, their argument is immaterial because the significant fact is that, as the district court found, T&B thought that the engineers were critical, and we judge T&B's conduct on the basis of its view of the situation.

> I find therefore that by arbitrarily denying welfare benefits to certain employees whose jobs were significantly affected by the acquisition and conferring those benefits arguably to people equally affected by the acquisition was a breach of that duty.

The court also indicated that "the uncontroverted testimony supports my analysis that in an effort to combat a threat to its management decision to [acquire] the Tennessee based company, management decided in midstream to administer its severance policy in a way that perverted the spirit and intent of the severance plan under ERISA and its own written policy."

Ultimately the court concluded that:

> Overall then, I find the acquisition of American Electric created a termination event that required administration of severance plan to all employees. Those employees choosing to accept . . . an offer of continued employment were not terminated. Those declining the offer were effectively terminated under the circumstances established by the evidence, which include geographical distance of the relocation, the certainty of continued employment unameliorated by management, and foreseeable effects on family life which was specifically not considered on a individual basis by management.

Thus, the court believed "that management's withholding of these employees' severance pay was based on punitive coercive motives designed solely to protect and benefit the employer to the detriment of plaintiffs." Consequently, in the court's view the plaintiffs were entitled to severance benefits.

We cannot accept the district court's legal conclusions. First of all, of course, for the reasons we already have set forth we reject the district court's application of fiduciary standards here. Moreover, we see no reason for concluding that "the terminating manager [who did not] believe[ ] the granting of [severance] pay [was] appropriate" was arbitrary or capricious in reaching that conclusion. In *Berger* we indicated "that only the employer determines whether an employee's retirement is in the company's best interest. Neither the plan administrator nor the pension board have the authority to override the company's business decision." *Berger*, 911 F.2d at 918.

The T&B plan provided that the test for granting severance pay upon involuntary termination was whether the terminating manager believed "the granting of such pay is appropriate." We fail to see how the denial of severance pay was inappropriate as a business decision reached by T&B. Plainly, there was nothing arbitrary or capricious about T&B's decision to discourage employees it regarded as critical from terminating their employment. Indeed, the sincerity and reasonableness of T&B's decision was demonstrated by its willingness to absorb substantial expenses to relocate the plaintiffs.

Appendix B

The fact that in some other circumstances T&B awarded severance pay to other employees who would not relocate in no sense required it to find that it was appropriate to do so in plaintiffs' cases. Obviously, an employer may make a determination as to the appropriateness of granting severance pay based on the circumstances of each case and thus past practice cannot control its exercise of discretion in other circumstances. *See McNab*, 162 F.3d at 961-62; *Nevill v. Shell Oil Co.*, 835 F.2d 209, 211 (9th Cir. 1987); *cf. Nazay v. Miller*, 949 F.2d 1323, 1336 (3d Cir. 1991) (administrator's decision). The district court's reasoning was flawed as it considered whether T&B was acting arbitrarily or capriciously as a fiduciary, and thus the court was taking into account only the interests of the employees as plan participants or beneficiaries. Viewed from the correct prospective, T&B plainly was not arbitrary or capricious in denying severance benefits and accordingly it is entitled to a judgment in its favor.

T&B also argues that the district court abused its discretion by awarding plaintiffs attorney's fees and costs under ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1), as well as prejudgment interest. Obviously, we have no need to linger on this point as the reversal of the award of severance benefits compels the reversal of the award of prejudgment interest and attorney's fees and costs because plaintiffs are no longer prevailing parties. Finally, T&B argues that the district court erred in certain evidentiary rulings, but in view of our result this issue is moot.

We carefully have examined plaintiffs' cross-appeal with respect to the sanctions and find that it is clearly without

merit. In any event, we find nothing in plaintiffs' brief to support a conclusion that the excluded evidence if admitted could have created a record that would have led us to reach a different result than the one we set forth. While plaintiffs suggested at trial that the testimony would establish T&B's liability, in view of our conclusions which are predicated on legal determinations based on the plan itself, we reject this contention.[6]

III. CONCLUSION

In closing our opinion we emphasize that while we are treating this case as involving involuntary terminations and that our result for this reason may seem harsh, the term "involuntary termination" must be understood in the context of this case. The parties agree that T&B wanted the plaintiffs to remain in its employ, and thus T&B offered them significant incentives to move to Memphis. Accordingly, this case is not one in which the employees were intentionally set adrift by an uncaring employer. Moreover, this case in no sense involved oppressive or intolerable employment conditions such as might have constituted a constructive discharge in a discrimination case. Quite to the contrary, this case concerns the effect on the plaintiffs of T&B's unassailable business decision to move its Electrical Division to Memphis. At bottom, then, this case involves nothing more than an employer determining that it is not appropriate to

---

6. It is questionable whether plaintiffs have preserved the sanctions issue as they apparently intend to pursue it only if we remand the case for "a new trial." Br. at 51 n.10; Reply Br. at 1 n.1. Of course, we are not remanding for a new trial. Nevertheless, we are rejecting their contentions on the merits.

grant severance benefits to employees leaving their employment when the employer wishes them to remain.[7] We will not reject such a decision.

For the foregoing reasons the orders of August 6, 1998, and October 19, 1998, will be reversed, and the order of August 17, 1995, will be affirmed. The matter will be remanded to the district court for entry of a judgment in favor of T&B.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

---

7. We also point out that the decision to deny severance pay did not nullify the plaintiffs' pension rights.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 98-6298, 98-6328,
and 98-6432

PETER NOORILY; RAYMOND P. NASTAWA

v.

THOMAS & BETTS CORPORATION; EMPLOYEE
BENEFIT PLAN OF THOMAS & BETTS CORPORATION

(D.C. Civil No. 93-2227)

SIDNEY LEVY

v.

THOMAS & BETTS CORPORATION; EMPLOYEE
BENEFIT PLAN OF THOMAS & BETTS CORPORATION

(D.C. Civil No. 93-2228)

WILLIAM O. DECK

v.

THOMAS & BETTS CORPORATION; EMPLOYEE
BENEFIT PLAN OF THOMAS & BETTS CORPORATION

(D.C. Civil No. 93-2229)

Appendix B

Thomas & Betts Corporation; Employee Benefit Plan of Thomas & Betts Corporation,

Appellants in No. 98-6298

PETER NOORILY; RAYMOND P. NASTAWA

v.

THOMAS & BETTS CORPORATION; EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION

(D.C. Civil No. 93-2227)

SIDNEY LEVY

v.

THOMAS & BETTS CORPORATION; EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION

(D.C. Civil No. 93-2228)

WILLIAM O. DECK

v.

THOMAS & BETTS CORPORATION; EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION

(D.C. Civil No. 93-2229)

Appendix B

Peter Noorily; Raymond P. Nastawa;
Sidney Levy; William O. Deck,

Appellants in No. 98-6328

PETER NOORILY; RAYMOND P. NASTAWA

v.

THOMAS & BETTS CORPORATION; EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION

(D.C. Civil No. 93-2227)

SIDNEY LEVY

v.

THOMAS & BETTS CORPORATION; EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION

(D.C. Civil No. 93-2228)

WILLIAM O. DECK

v.

THOMAS & BETTS CORPORATION; EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION

(D.C. Civil No. 93-2229)

Appendix B

Thomas & Betts Corporation; Employee Benefit Plan of Thomas & Betts Corporation,

Appellants in No. 98-6432

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 93-02227/28/29)
District Judge: Honorable Katharine S. Hayden

Argued July 15, 1999

Present: Greenberg and Alito, *Circuit Judges*, and Stafford,* *District Judge*

JUDGMENT

These causes came on to be heard on the record from the United States District Court for the District of New Jersey and were argued by counsel on July 15, 1999.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court entered August 6, 1998 and October 19, 1998, be, and the same are hereby reversed. The order entered August 17, 1995 is hereby affirmed. The matter is remanded to the District Court for entry of a judgment in favor of Thomas & Betts Corporation. Costs taxed in favor of Thomas & Betts

---

* Honorable William H. Stafford, Jr., Senior Judge of the United States District Court for the Northern District of Florida, sitting by designation.

Corporation. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ P. Douglas Sisk
Clerk

Dated: August 25, 1999

APPENDIX C — ORDER FOR JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY ON POST TRIAL APPLICATIONS DATED OCTOBER 15, 1998 AND FILED OCTOBER 16, 1998

COHN LIFLAND PEARLMAN
HERRMANN & KNOPF LLP
Peter S. Pearlman
Fed. Bar No. PP 8416
Attorneys for Plaintiffs
Park 80 Plaza West One
Saddle Brook, New Jersey 07663
(201) 845-9600

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 93-2227 (KSH)

Hon. Katherine S. Hayden

PETER NOORILY and RAYMOND P. NASTAWA,

Plaintiffs,

– vs –

THOMAS & BETTS CORPORATION and EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION,

Defendants.

Appendix C

CIVIL ACTION NO. 93-2228 (KSH)

Hon. Katherine S. Hayden

SIDNEY LEVY,

Plaintiff,

– vs –

THOMAS & BETTS CORPORATION and EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION,

Defendants.

CIVIL ACTION NO. 93-2229 (KSH)

Hon. Katherine S. Hayden

WILLIAM O. DECK,

Plaintiff,

– vs –

THOMAS & BETTS CORPORATION and EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION,

Defendants.

Appendix C

ORDER FOR JUDGMENT ON POST TRIAL APPLICATIONS

This Court having entered an Order for Judgment and an Order for Judgment Amended as to paragraph 2 on August 5, 1998, in which it awarded judgments to Peter Noorily in the amount of $70,621.80, to Raymond Nastawa in the amount of $23,247.81, to William Deck in the amount of $57,001.80 and to Sidney Levy in the amount of $103,453.80, and in which it reserved decision on plaintiffs' application for prejudgment interest and having authorized plaintiffs' counsel to submit a certification in support of plaintiffs' application for counsel fees and costs; and the Court having reviewed plaintiffs' application for prejudgment interest; and plaintiffs' counsel having submitted a certification in support of their application for counsel fees and costs; and defendant having opposed plaintiffs' application for prejudgment interest and counsel fees and costs; and the Court having read and considered all documents submitted in support and in opposition to the post judgment application for prejudgment interest and counsel fees and costs; and the Court having rendered an opinion on plaintiffs' post trial applications on September 14, 1998; and good cause being shown for the making and granting of this Order for Judgment on plaintiffs' post trial application,

It is on the 15th day of October, 1998, ORDERED and ADJUDGED as follows:

1. Judgment is entered in favor of plaintiffs and against defendant, Thomas & Betts Corporation, for prejudgment interest up to and including August 5, 1998, in the following amounts:

(a) in favor of Peter Noorily in the amount of $26,424.05;

(b) in favor of Raymond Nastawa in the amount of $8698.46;

(c) in favor of William Deck in the amount of $20,056.56;

(d) in favor of Sidney Levy in the amount of $35,176.38.

2. Judgment is entered in favor of Cohn Lifland Pearlman Herrmann & Knopf LLP and against defendant, Thomas & Betts Corporation, for attorneys' fees in the amount of $190,321 and costs in the amount of $8075.19.

s/ Katherine S. Hayden
Katherine S. Hayden, U.S.D.J.

APPENDIX D — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY ON PLAINTIFFS' POST-TRIAL APPLICATIONS DATED AND FILED SEPTEMBER 14, 1998

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action Nos. 93-2227, 93-2228,
93-2229 (KSH)

PETER NOORILY, et al.,

Plaintiffs,

v.

THOMAS & BETTS CORPORATION and EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION,

Defendants.

OPINION ON PLAINTIFFS' POST-TRIAL APPLICATIONS

KATHARINE S. HAYDEN, District Judge

The parties to this suit have submitted their briefs on plaintiffs' application for an award of attorneys' fees and payment of prejudgment interest, the issues remaining to be decided after this court found for plaintiffs on their claims under ERISA. Additionally, counsel for plaintiffs has submitted a certification of attorney services and costs of

litigation, which has been challenged by defendant through an evaluation of their calculations by Richard Collier, Esq.

Attorneys' Fee Award

The imposition of fee-shifting and prejudgment interest upon defendant are matters left to the sound discretion of the trial court; indeed, in the latter instance ERISA is silent, and it is case law that defines the standards to be applied by trial judges doing their best to exercise that discretion wisely. From the plethora of cases the parties supplied for my consideration, in full or by citation, one was omitted that appears to offer the most guidance, *McPherson v. Employees' Pension of Am. Re-Insurance Co.*, 33 F.3d 253 (3rd Cir. 1994), in which the Third Circuit visited and clarified the five governing *Ursic*[1] factors, in particular the first one.

---

1. *Ursic v. Bethlehem Mines*, 719 F.2d 670, 673 (3rd Cir. 1983), set forth this Circuit's statement of the five-factor test applied in determining fee applications:

> 1) the offending party's culpability or bad faith;
>
> 2) the ability of the offending party to satisfy an award of attorneys' fees;
>
> 3) the deterrent effect of a fee award;
>
> 4) the benefit conferred on members of the plan as a whole;
>
> 5) the relative merits of the respective parties' positions.

The court noted that the first factor requires examination of bad faith *or* culpability and held that a party may be deemed culpable without an ulterior motive. The decision adopts the Black's Law Dictionary definition of culpability: culpable conduct is " 'blameable, censurable; . . . at fault; involving the breach of a legal duty or the commission of a fault. . . .' " *Id.* at 256-57 (citation omitted). The analysis leaves no doubt that a court need not find bad faith. The offending party's conduct may in fact fall short of bad faith and still satisfy the first factor if the party is culpable, that is "at fault in causing the dispute underlying the motion for attorney's fees," or if the offending party acted arbitrarily or capriciously. *Citrin v. Erikson*, 918 F. Supp. 792, 800 (S.D.N.Y. 1996). The salutary goals of ERISA are served if a court awards attorneys' fees to deter behavior that falls short of bad faith conduct, according to *McPherson. Id.* at 258.

This examination of the lead-off *Ursic* factor is very useful. Plaintiffs have complained, and the court agrees, that defendant once again argues the merits of its executive decision making even after the court has clearly rejected its contentions. Put another way, defendant still defends its actions in the face of the court's conclusion that defendant was culpable, at fault here, blameable, responsible for the underlying dispute that leads us to this point. Is this present posture, any more than defendant's past position, indicative of bad faith? No. But whether or not defendant accepts it,[2] the conduct it defends is culpable in the legal sense.

---

2. There isn't much self-critical analysis evident. Defendant argues that it "was thrust into this situation by the action of a majority

(Cont'd)

Appendix D

McPherson teaches that the trial court must "articulate its analysis and conclusions as it considers each of the five *Ursic* factors." *Id.* at 254. So as to this first one, aided by the *McPherson* case, I find the defendant's culpability is demonstrated, among other ways, by the following. Top officials at T&B acquired a company based in Memphis and closed the deal in the final months of 1991 knowing that relocation of the engineering department was inevitable. Management did not communicate this to the affected employees until the waning days of the negotiations and closing on the acquisition, and management badly miscalculated the extent of the veteran engineers' unwillingness to relocate. T&B had, in all prior circumstances that could be analogized to this one, paid severance; it had an articulated policy and that policy was known to the workers, indeed had been improved upon not long before. *When they asked, the engineers were told that they would get severance if they didn't move to Memphis.* It was only after Kevin Dunnigan, CEO and the management person most involved with the acquisition, was informed that there was marked reluctance among the engineers to go and live in Memphis, that this changed. In his eyes, paying severance would be an "incentive" to leave and leaving was

---

(Cont'd)
of the engineers"; that "the company had no choice but to act as it did, because it believes that, but for its action, no more than 25% of the engineering department would have relocated, with the additional resultant harm to the company." Db at p.5. These points are an admission of the coercive intent behind the decision to deny plaintiffs their severance and a pronouncement the company was putting its needs ahead of the plaintiffs' notwithstanding its fiduciary responsibilities.

the last thing management wanted the engineers to do. Rather than using the "honey" of guaranteed employment to those who relocated, and in spite of the dedicated work of these engineers, management chose to use the "club" of withholding severance pay in contravention of an unbroken policy of giving it to employees terminated for reasons other than cause.

Dunnigan testified he did not consider the needs of the engineers; he demonstrated he was unacquainted with the specifics of the severance policy even though its author was working alongside him during the transition phase of the relocation and even though that person had told the engineers initially that they would be getting severance. He perceived human concerns about ageing parents, spouse's employment, family ties as intransigence; he acted out of an impatience with the employees' needs and interest and a one-dimensional commitment to the needs and the interests of the company. I will agree with defendant that this isn't bad faith, and I will agree that what defendant did may not "involv[e] malice or a guilty purpose"; but I have found and continue to find that the conduct is "wrong," and under the circumstances, "reprehensible," *McPherson*, 33 F.3d at 256-57, and thus culpable. The first *Ursic* factor favors an award of attorneys' fees.

The second factor deals with ability to pay, which is not at issue. The third, deterrence, I have alluded to above where the *McPherson* court notes that attorneys' fees awards may be employed by the trial court to deter behavior falling short of bad faith conduct. *Id.* at 258. Also, as indicated in n.2 above, defendant remains blind to the plain wrongness of its

decision. I understand the context of its defense of its decision is to persuade me that withholding severance was not a venal and malicious act. Management claims it simply *had* to get those senior engineers down to Memphis. But it arranged to do so in a way that was arbitrary and not in keeping with its fiduciary duties in administering an employee welfare plan according to the requirements of ERISA. An award of attorneys' fees to the employees who successfully sue in response is an effective deterrent against future management decisions of this ilk when management *has* to get something done. The second and third *Ursic* factors favor an award of fees.

The fourth factor, the benefit the plaintiffs' lawsuit conferred generally upon members of the plan,[3] doesn't strictly apply in these circumstances. We are dealing with a small number of engineers cordoned off from the general population by management precisely because they were valuable; ironically, the less valuable got severance in keeping with the company's previously unbroken policy of paying it. Ironically too it should be observed that the general membership appears to be well treated by management. The best that can be said is that the executive behavior at issue

---

3. The court is aware that the fourth *Ursic* factor speaks of membership in a pension plan, and in fact defendant bases some of its arguments on the fact that the payments at issue flow from a severance policy and not a pension plan, and the decision to pay severance is one that is made by the exercise of some discretion on the part of line management. The court has not found any case law suggesting that the *Ursic* factors, including this fourth one, must be applied any differently in cases where benefits other than pension plan benefits are at issue.

was aberrational and arose out of management's desire to preserve the good reputation of T&B as a highly competent company with a cadre of engineers who would arrive in Memphis on schedule. When management is firmly corrected after it insists on doing the wrong thing for what it thinks is the right reason, arguably, there is a benefit conferred on all employees who are subject to discretionary decisions.

The fifth factor scrutinizes the relative merit of the parties' positions. Management decided when the engineers put their family and personal needs alongside the relocation opportunity offered and chose the former, that it would not "reward" them with "an incentive" by paying severance. None of the plaintiffs wanted to leave T&B employment. It is uncontroverted that plaintiffs had demonstrated impeccable loyalty and competence; three had spent most of their professional careers as T&B engineers. Despite this, management chose not to offer as a positive incentive a guarantee of a certain period of employment, even though the same three of the four plaintiffs were in their fifties and would be genuinely at risk should T&B lay them off after the relocation. Plaintiffs asked about their severance package after learning about the relocation, and were told it would be offered; management changed its mind and used the denial of severance as a coercive technique to discourage the choice that plaintiffs, in good faith, felt they had to make. Management admitted it exercised its discretion on facts not encountered before, in the wake of an unbroken record of paying severance when making a termination not-for-cause, because it had seriously miscalculated how the employees would react to the need for relocation. Management admitted as well that it did not focus in any appreciable degree, when

revamping the severance policy, on what the employees' issues were likely to be on a case-by-case basis. The facts advanced by all plaintiffs for why they chose to leave their positions were credible, genuine and based on serious and in some instances painful family concerns. The relative merits of the parties' positions favor the award of attorneys' fees.

As can be seen the court has found the *Ursic* factors soundly support an award of attorneys' fees. Defendant, exercising good advocacy, has set forth its challenges to the amounts and categories set forth in Mr. Pearlman's records of fees and costs. I have reviewed the Certification of Richard Collier, Jr., Esq. and arguments in defendant's brief. Legal fees billed for time spent on the state court actions that plaintiffs voluntarily dismissed will be deducted from the total claimed; using defendant's calculation this amounts to $20,589.75. I am not persuaded by defendant's attack on the hourly rates charged by the attorneys working on plaintiffs' case (particularly when defendant uses as a measuring stick language from an unpublished opinion from 1993); similarly I do not find the charges for more than one attorney to be objectionable. Counsel was representing four plaintiffs with different facts attaching to each one. The propriety of applying for "fees on fees" was recently addressed by the Third Circuit in *Hernandez v. Kalinowski*, 146 F.3d 196 (3rd Cir. 1998), which did not condemn the application. *Id.* at 199-201; *see also Prandini v. National Tea Co.*, 585 F.2d 47, 53-54 (3rd Cir. 1978) (reasoning that if an attorney is denied compensation for the time expended litigating his fee claim, "the attorney's effective rate for all the hours expended on the case will be correspondingly decreased").

I do find that, in this highly computerized age, the significant number of hours billed by Ms. DePaolo require reduction from 18.17 to 7, the same number billed by Mr. Pearlman. The law clerk's billing may stand given the substantial amount of ministerial work in preparing these applications. The claim for $3,354.97 for undifferentiated delivery and investigation charges, telephone tolls and postage, on its face appears to fall outside the recoverable costs detailed in 28 U.S.C. § 1920 and will be disallowed. So will the claim for "travel" in the amount of $503.05. Using common sense in evaluating the requested $5,525.60 for costs associated with printing, binding, reproducing documents and sending faxes, I have no doubt these costs were incurred, and in fact used the product of many of them. They are not set forth with the necessary particularity, and are not all recoverable. They will be reduced by one-half. Computer research costs are facts of life and will be allowed on the theory that their omission from the statute relates to the digital age and not Congressional intent. No "corporate checks." The balance of the costs complained of on pages 31 and 32 of defendant's brief will be allowed as implicit in the categories permitted by § 1920.

Mr. Pearlman will prepare an Order (that will not reflect his time spent in its preparation) reflecting the award of fees and costs consistent with the foregoing.

Prejudgment Interest

It was important to concentrate on the factors relating to an award of attorneys' fees first, because my reasoning plays some role in the decision on prejudgment interest.

Appendix D

Prejudgment interest "typically is granted to make a plaintiff whole" because defendant otherwise "may wrongly benefit from use of plaintiff's money." *Schake v. Colt Indus.*, 960 F.2d 1187, 1192 n.4 (3rd Cir. 1992) (citing *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 752 (8th Cir.), *cert. denied*, 476 U.S. 1141, 106 S. Ct. 2249, 90 L. Ed. 2d 695 (1986)). In *Anthuis v. Colt Indus. Operating Corp.*, 971 F.2d 999 (3rd Cir. 1992), the court held that:

> "[a]s a general rule, prejudgment interest is to be awarded when the amount of the underlying liability is reasonably capable of ascertainment and the relief granted would otherwise fall short of making the claimant whole because he or she has been denied the use of the money which was legally due."

Id. at 1010 (quoting *Stroh Container Co.*, 783 F.2d at 752). No one disputes that T&B has had the use of the value of the severance benefits over the years since the company withheld them. The *Anthuis* decision goes on to hold that " 'prejudgment interest should ordinarily be granted unless exceptional or unusual circumstances exist making the award of interest inequitable.' " *Id.* The only circumstances arguably qualifying would be those defendant pointed to in resisting the fee application: that it was facing exigent circumstances, that it was not acting in bad faith, that management had some discretion in paying severance as distinguished from administering pension payouts. But as seen above I am not persuaded that these facts are anything more than justifications for why management did what it did.

The applicable case law weighs in favor of an award of prejudgment interest. It will be calculated at the federal post-judgment statutory rate,[4] to commence on the respective last dates of each plaintiff's employ. Mr. Pearlman will submit an Order after Mr. Lewis has had an opportunity to review his calculations.

s/ Katharine S. Hayden
KATHARINE S. HAYDEN
United States District Judge

Dated: Sept. 14, 1998

---

4. The court will follow the reasoning of other district courts in our Circuit that held that as a federal question the rate of prejudgment interest in an ERISA case is governed by federal law and looked to 28 U.S.C. § 1961 as the analogous section for postjudgment interest. *See Hardtke v. Exide Corp.*, 821 F. Supp. 1021, 1031 n.17 (E.D. Pa. 1993); *Kann v. Keystone Resources, Inc.*, 575 F.Supp. 1084, 1096 (W.D. Pa. 1983).

APPENDIX E — ORDER FOR JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY (AMENDED AS TO PARA. 2) DATED AUGUST 5, 1998 AND FILED AUGUST 6, 1998

COHN LIFLAND PEARLMAN
HERRMANN & KNOPF LLP
Peter S. Pearlman
Fed. Bar No. PP 8416
Attorneys for Plaintiffs
Park 80 Plaza West One
Saddle Brook, New Jersey 07663
(201) 845-9600

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 93-2227 (KSH)

Hon. Katherine S. Hayden

PETER NOORILY and RAYMOND P. NASTAWA,

Plaintiffs,

– vs –

THOMAS & BETTS CORPORATION and EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION,

Defendants.

Appendix E

CIVIL ACTION NO. 93-2228 (KSH)

Hon. Katherine S. Hayden

SIDNEY LEVY,

Plaintiff,

– vs –

THOMAS & BETTS CORPORATION and EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION,

Defendants.

CIVIL ACTION NO. 93-2229 (KSH)

Hon. Katherine S. Hayden

WILLIAM O. DECK,

Plaintiff,

– vs –

THOMAS & BETTS CORPORATION and EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION,

Defendants.

Appendix E

ORDER FOR JUDGMENT AMENDED AS TO PARA. 2

These matters having come on for trial before the Honorable Katharine S. Hayden, without a jury, on June 23, 24, 25, 26 and 29, 1998; and the Court having heard and considered the testimony of the witnesses; having reviewed and considered all exhibits introduced by the parties; and having heard and considered the argument of counsel; and the Court having placed its findings and its decision on the record on July 7, 1998; and good cause being shown for the making and granting of this Order for Judgment,

It is on the 5th day of August, 1998, ORDERED and ADJUDGED as follows:

1. Judgment is entered in favor of Peter Noorily and against Thomas & Betts in the amount of $70,621.80, representing a severance payment in the amount of $64,500, and severance medical in the amount of $6,121.80.

2. Judgment is entered in favor of Raymond Nastawa and against Thomas & Betts Corporation in the amount of $23,247.81, representing a severance payment in the amount of $21,011, and severance medical in the amount of $2,236.81.

3. Judgment is entered in favor of William Deck and against Thomas & Betts Corporation in the amount of $57,001.80, representing a severance payment in the amount of $50,880, and severance medical in the amount of $6,121.80.

4. Judgment is entered in favor of Sidney Levy and against Thomas & Betts Corporation in the amount of $103,453.80, representing a severance payment in the amount of $97,332, and severance medical in the amount of $6,121.80.

5. The Court reserves decision on plaintiffs' application for pre-judgment interest.

6. Plaintiffs' counsel shall submit a certification in support of plaintiffs' application for counsel fees and costs.

s/ Katherine S. Hayden
Katherine S. Hayden, U.S.D.J.

APPENDIX F — TRANSCRIPT OF PROCEEDINGS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED JULY 7, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil No. 93-2227

PETER NOORILY and RAYMOND P. NASTAWA,

Plaintiffs,

v.

THOMAS & BETTS CORPORATION and EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION,

Defendants.

Civil No. 93-2228

SIDNEY LEVY,

Plaintiff,

v.

THOMAS & BETTS CORPORATION and EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION,

Defendants.

Appendix F

Civil No. 93-2229

WILLIAM O. DECK,

Plaintiff,

v.

THOMAS & BETTS CORPORATION and EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION,

Defendants.

TRANSCRIPT OF PROCEEDINGS

BEFORE: HONORABLE KATHARINE S. HAYDEN,
UNITED STATES DISTRICT JUDGE

* * *

[3] THE COURT: All right, everyone, please be seated.

I'll read my decision in this case on the record and initially observe that I'm going to reserve the right to proofread the transcript in the event that there are any mistakes or citations or whatever that I haven't been able to put on. It's late now. I want to give you the benefit of the opinion and not spend any more time on cleanup than I need to so that at least you will have the benefit of the ruling of the Court.

Appendix F

I am making findings using in part findings proposed by the parties and supplementing them with findings that I have made. Counsel may notice in some areas there may be a repetition in my supplemental findings of fact with findings I've already made. That is the kind of change that I probably will do to the transcript and that's what I'm not going to spend time doing right now.

In terms of the findings of fact, I find that plaintiff Peter Noorily was employed by defendant Thomas & Betts Corporation from July 14, 1969 to February 14, 1992, and as of January 1992 he was employed as an engineer in the electrical division of Thomas & Betts. As of January 1992 Mr. Noorily was 61 years of age, his salary was $67,080 per year.

Plaintiff Nastawa was employed by Thomas & Betts from March 18, 1974 to February 14, 1992. As of January 1992 he was employed as an engineer in the electrical division of Thomas & [4] Betts. As of January 1992 his salary was $57,500 per year and he was 45 years of age.

William Deck was employed by Thomas & Betts from June 6, 1966 through June 30, 1992. As of January 1992 he was employed as a senior manufacturing engineer in the electrical division of Thomas & Betts. He was 59 years of age and his salary was $49,920 per year.

Sidney Levy was employed by Thomas & Betts from March 1, '71 through September 30, 1992. As of January 1992 he was employed as an advisory engineer in the electrical division of Thomas & Betts, 59 years of age, and his salary was $71,280 a year.

Appendix F

In December 1991 Thomas & Betts announced that as a result of the acquisition of American Electric Company it was relocating its electrical division from Bridgewater, New Jersey to Memphis, Tennessee. At the same time Thomas & Betts informed each of the engineers in the electrical division, including the four plaintiffs above named, that their jobs were being relocated to Memphis.

A meeting was held on or about December 5, 1991 which was attended by members of the engineering staff of Thomas & Betts, representatives of management of Thomas & Betts and representatives of American Electric. Among those in attendance were all of the plaintiffs as well as Michael McBride, vice president of Thomas & Betts electrical division, and John Walsh, [5] the vice president of human resources for Thomas & Betts.

At the December 5 meeting management responded to a question by a member of the engineering staff by advising all of those present that any member of the electrical division who was asked to move to Memphis and declined the offer would be entitled to and would receive severance pay.

A December 6 memorandum was circulated to various employees of Thomas & Betts by Richard Lovell, director of human resources. I will refer to that document later, and that document is P-36.

P-36 was circulated to, among others, William Frey, director of engineering in Thomas & Betts' electrical division. In fact, P-36 has on it a list of management personnel who received it.

Appendix F

I'm not going to read the contents of P-36. Counsel are all familiar with P-36. As indicated, I'm referring to its language a little bit later on in the opinion.

For purposes of the severance policy that is set forth in the manual, which is P-38, I find that Mr. Noorily was considered exempt nonsupervisory, Mr. Nastawa was considered exempt nonsupervisory, Mr. Deck was considered exempt nonsupervisory, and Mr. Levy was considered exempt manager supervisor.

I think at this point it makes sense to indicate on the record exactly what I consider to be the critical documents [6] among the exhibits. They would be P-3, which is representative of P-10, P-16 and P-25, which are the position transfer memos that were sent to the four plaintiffs; P-35, which is a memo dated 9-18-90 setting forth new severance pay amendments and particularly the rule of 80; P-36 that I just referred to, which is a memo on the severance package that was discussed — the severance package that was discussed earlier in the month of December and sent to certain management people; P-37, which is the January 6, 1992 memo to all electrical division employees located in Bridgewater; and P-38, which is the electrical division policy manual for supervisors and managers dated 3-6-91; and, finally, P-15, which is a memo to Mr. Levy indicating that as a member of the management staff he's entitled to receive the manual that I just referred to, which is P-38.

I will be referring to these documents from time to time, but insofar as exhibits are concerned, those are the exhibits that I will be referring to.

Appendix F

As indicated, one of those documents is the severance policy laid out in P-38 and also laid out in P-35, and it is in those categories, exempt, non-exempt, supervisor, non-supervisor, so on, that the plaintiffs fell.

Back to the December 6 memorandum. It was widely circulated among the employees in the electrical division and was read, reviewed and considered by the plaintiffs Noorily and [7] Nastawa, Levy, Deck, among others.

I find that there was no apparent attempt made to maintain it as confidential and, more importantly, I find from the testimony that the document, P-36, was intended to be used and was used by management personnel to answer employees' questions during the month of December.

There were staff meetings among the engineers and occasional and frequent meetings among the engineers that all of the plaintiffs testified to at which the issue of severance came up. At least one engineering staff meeting of a more formal basis was attended by the plaintiffs, among others, and chaired by Mr. Frey, who was the director of engineering.

As a result of that meeting the oral representations that I alluded to earlier, that severance would be paid in response to questions by employees, were apparently confirmed because no change was made in terms of points of view of plaintiffs which, as to each testifying plaintiff, and all four testified, was that they would be receiving severance according to the severance policy laid out in P-36, which in large part reflects the manual severance policy.

I find too that according to the testimony of everybody who testified, the policy of Thomas & Betts had always been to report any employee, exempt employees who left voluntarily, payments of severance in accordance with the severance policy that was outlined in the manual. In 1990 when Thomas & Betts' [8] electronics division was moved to South Carolina, all members of the electronics engineering staff, the model shop staff, and all engineering designers who declined the offer to move received severance.

I find that of the four plaintiffs, two of them, Mr. Noorily and Mr. Nastawa, were specific in declining the offer and made it very clear to those personnel who interviewed them, and these include Mr. Myler from Memphis, Mr. Hunihan and various members of the senior staff, that they were unable to, for personal reasons, to move to Memphis.

I find that the remaining plaintiffs, Mr. Deck and Mr. Levy, were equally clear about their inability to move to Memphis, but that they were offered transition work, and I will be speaking about the transition opportunity a little bit later on in my findings.

There was a distinction that the testimony established between the availability of the transition work of Mr. Levy and Mr. Deck versus the unavailability of Mr. Nastawa and Mr. Noorily. I make that as a finding. That is simply a finding of fact, not a reflection upon motivation, but simply a distinction in the personal circumstances of the four plaintiffs.

Appendix F

Notwithstanding, based upon compelling personal reasons as to each of the plaintiffs, Mr. Noorily, Mr. Nastawa, Mr. Deck and Mr. Levy, each determined not to accept Thomas & Betts' [9] offer to relocate to Memphis; Mr. Noorily's declining to relocate to Memphis because of his age, the fact that he and his wife were responsible for their aged and infirm mothers, because there was no guarantee of any continuing employment in Memphis. Mr. Noorily understood that as an employee at will, he could be terminated at any time.

Let me point out as well, this was not emphasized in the presentations, that it appears from P-3, P-10, P-25 and P-16, each of the plaintiffs received this memo. I believe it was authored by Mr. McBride. The document has additional information attached to it, and there is, I guess the fourth page, there is a two-page letter and then there is attachments of two pages. But in a note on the second page there is the following language: "In considering the less obvious economic considerations, you should remember that this information makes certain assumptions, such as you continuing to work for Thomas & Betts or another company until you are 65 years old, or that the provisions of the programs discussed are not changed. Although Thomas & Betts has no present intention of changing the terms of these plans, there is no guarantee that you will continue to work for Thomas & Betts until you are 65 years old, nor is there any guarantee that the terms of the aforementioned plans will not change. You must remember that the employment relationship in our Memphis operation is an at will relationship, just as the relationship exists at Thomas & Betts."

[10] Therefore, as I recall, I myself questioned the basis for the plaintiffs' belief in their testimony that they were at some risk if they moved. I find that their perception of some risk was in fact based upon a specific paragraph in the letter that was in fact encouraging the move by setting forth the transition policy and the relocation package that each of them received.

Mr. Noorily's decision not to uproot himself and his family to move to Memphis I find to be a reasonable one.

Mr. Nastawa's personal reasons for refusing the offer to relocate included his obligation to care for his mother-in-law who suffered from Parkinson's disease, had a leg amputated, suffered from circulatory problems and paranoia. The fact that his wife had an established career, considerations for his children who were established in the school system, and he had an understanding of no guarantee of continued employment in Memphis. He understood that he could be terminated at any time. His decision not to uproot himself and his family to Memphis was objectively reasonable.

The considerations of Mr. Levy not to move involved his age, his mother-in-law's move to a long care facility after having both lost her husband and having been operated on for cancer, the fact that Mr. Levy lived on the east coast all his life and his entire family, including his children and grandchildren, were here, and his understanding that there is no [11] guarantee of any continued employment and that as an employee at will he can be terminated at any time. Like the other plaintiffs, I find that his decision not to uproot himself and his family to move to Memphis was objectively reasonable.

Appendix F

The personal reasons compelling Mr. Deck's decision not to move, his responsibility to care for his 86-year old mother who was partially blind. Mr. Deck also had no guarantee of any continued employment in Memphis, too understood that as an employee at will he could be terminated at any time. I find his decision not to move to Memphis was objectively reasonable.

At the end of December 1991 or early January 1992, the four plaintiffs each advised Thomas & Betts that each one elected not to move to Memphis.

Other than the engineers in the engineering department, all employees who did not move to Memphis received severance payment in accord with Thomas & Betts' policy.

Two pieces of correspondence issued from management on January 6, 1992, one I previously referred to, and that was the memo that went to everybody, which was P-37. It set forth the severance pay and benefits that would go to all employees who have not been asked to relocate to Memphis.

There was also another January 6, 1992 memo that was sent to each of the plaintiffs that required a decision from each of them as to whether they would move to Memphis. This memorandum, which is in fact P-3, 10-16-95, stated for the first [12] time in any written manner that a decision not to relocate would be deemed to be a resignation.

Therefore the second January 6 memo, which is actually the memo I referred to, was the first notice that any of the plaintiffs received that Thomas & Betts was purporting to

be considering that decision not to move to Memphis to be a voluntary resignation. Each of the plaintiffs declined to sign the memo that was addressed to them individually, P-3, 10, 16 and 25.

Mr. Deck in fact replied on January 9th via memo to Mr. McBride and sent copies to Mr. Lovell and Mr. Frey and Mr. Students and others at Thomas & Betts to the effect that while he had determined and chose not to relocate to Memphis, he was in fact not resigning, and in that same letter he offered to help Thomas & Betts by working on their relocation.

Mr. Noorily was not asked to work on transition by Thomas & Betts, nor was Mr. Nastawa.

Mr. Deck ultimately accepted Thomas & Betts' offer to work on transition, and he did so until June 1992.

For his part, Mr. Levy was asked to work on transition and received a written contract from Thomas & Betts offering him employment for 11 weeks on transition, which he accepted, and ultimately he remained employed at Thomas & Betts through September 1992.

Mr. Noorily was involuntarily terminated on [13] February 14, 1992. At the time of his termination he was asked to sign several documents which contained statements to the effect he resigned, and he declined to sign such documents. He demanded severance pay from Thomas & Betts in accordance with his rights under the company's severance policy and was refused.

Appendix F

Mr. Nastawa was involuntarily terminated on February 14, 1992. At the time of his termination he was asked to sign several documents which contained statements to the effect that he resigned his employment and declined to sign such documents. Mr. Nastawa demanded severance pay and he was refused.

Mr. Deck worked on transition and was terminated on February 14, 1992, and continued to work on transition until June 30, 1992, and asked to sign documents which contained statement to the effect he resigned his employment. He declined to sign such documents and instead wrote a memorandum to the personnel department stating that he had chosen not to relocate and, "I have at no time resigned my position with the company. For personal reasons I'm not relocating." He demanded severance pay from Thomas & Betts in accordance with his rights under his company's severance policy and was refused.

Mr. Levy worked on transition until September 30, 1992, at which time he was involuntarily terminated because he declined to move to Memphis. At the time of his termination he reiterated his belief in his entitlement to severance pay and [14] further reiterated that he had not resigned from the company. Nonetheless Thomas & Betts terminated Mr. Levy on that date and declined to pay him severance. He was asked to sign the document, which he refused to, and demanded severance from Thomas & Betts and was refused.

There was evidence to the effect that Adrian Kemp, who directed the customer service department, had proffered the names and suggested names of personnel who might be of

assistance to Thomas & Betts and might be willing to move. In return, she required from management assurances that if her proffered list of employees were in fact inclined to turn down the offer, were one offered to them of relocation, that they would not be harmed by being denied severance. The evidence suggests that no one in customer service was denied severance, and in fact there was a specific person who was specifically terminated as part of customer service department after management determined that she was no longer critical because other personnel were relocating, and she was not denied severance.

As counsel is aware, I've used the word "involuntary" in describing the termination of the four plaintiffs. Since that is a term that radiates outcome effect based upon how it has been used in this case, I want to clarify and make very clear what my line of reasoning in this case is, which differs somewhat from the arguments on both sides.

[15] In doing that, I wish to place on the record now my supplemental findings of fact, which are the findings the Court makes in weighing and evaluating and trying to make some analysis of the factual information that came out mainly through the testimony of management personnel as to the events of late November 1991 and into mid-January 1992.

The evidence shows that Thomas & Betts had never gone through a circumstance similar to the one facing management in December 1991 and 1992. Mr. Lovell indicated that in his deposition. This was confirmed by Mr. Dunnigan both in his deposition and in cross-examination. There had been relocations, but never before had those deemed by

management to be key personnel been identified, and never before had those identified key personnel refused to relocate.

In 1990, the year before the events that occupies us in this case, the electronics division had relocated to South Carolina. Severance was paid. There was no indication that severance was withheld from people who declined, and the explanation for this was that these particular personnel were not deemed to be key personnel and that was the justification for paying severance.

I find as well that management overestimated the number of engineers who would be willing to relocate and anticipated around 80 percent would move to Memphis. As it turned out, in January 1992 more than one half of the engineers were indicating [16] a reluctance to relocate. Management did not consider the people who were offered a job of a critical nature would not relocate to Memphis. I take this from the deposition of Mr. Lovell, page 88.

In fact, Mr. Lovell testified that management did not even think about these individual plaintiffs, but instead thought about the employees of the electrical division in totality. The engineers were considering by management to be critical employees. The engineers' decision to decline relocation did not result in the benefit to them or to a competitor of the defendant on the theory that they did not continue to work at their level of skill and experience as Thomas & Betts employees. Rather, the decision of the employees was not weighed by management as to the reasons for the decisions that they made, but, rather, as an absence of a valuable commodity, i.e., the engineers to staff the

engineering department that in fact did not have people in it, notwithstanding the fact that the engineering department in Memphis was going to be a key component of Thomas & Betts. In other words, the interest of the employees were not particularized or considered; rather, it was the interests and needs of management.

When management discovered the extent of the reluctance among the engineers, it was determined that anyone who did not transfer his position would not receive severance and would be [17] considered as having resigned. This was in response to management's conclusion that "the very purpose of the acquisition was being threatened" because the engineers were refusing to go to Memphis and it was a significant business issue which threatened a half billion dollar acquisition of American Electric. Thus having the engineers not go was "unacceptable" to management. I take this directly from the Walsh deposition, and Walsh is among the top management.

P-36, the memo circulated among the decision makers by Mr. Lovell, the decision makers meaning those who were managerial and would be making decisions regarding severance and other executive decisions, that memo made a distinction between employees who worked on transition and employees who did not work on transition. The date of this memo is December 6.

It is important to note that that distinction is between people who would work on transition and people who wouldn't. It was not a distinction made between people who would relocate and people who wouldn't. Those who were

not going to work on transition were called category two employees, and they were deemed to be eligible for a range of severance pay between the minimum of payment to the end of the 60-day notice period if they were released prior thereto and maximum of payment equal to the policy amount. Employees working on transition were category one employees and they were eligible for severance per the policy amount. An employee asked to [18] relocate who was unwilling would fall into either category. Either category called for severance, and an employee declining would, according to that 12-6-91 memo, get severance.

If the severance policy were applied to plaintiffs, Noorily and Nastawa would fall into category two designation and the plaintiffs Deck and Levy into category one. Neither Noorily nor Nastawa was offered transition work because Mr. Hunihan, who was the replacement for engineering director Frye, had determined that each man was categorically unwilling to relocate, and according to the CEO of Thomas & Betts, Mr. Dunn, the purpose of the transition was the opportunity created to further convince the employee in transition to have a change of mind and accept permanent relocation. Noorily's and Nastawa's strong position obviated any change of mind on their parts, and so they were not offered transition work.

The purpose of severance per the policy of the company set forth in P-35 and P-38, the policy and procedures manual prepared for management use, is to assist the former employees maintain their standard of living while securing employment. This policy is implemented in management's discretion. Examples of such circumstances, gross

misconduct would result in no severance, lack of skills for tough job would result in severance, insubordination would result in no severance. These are all examples given by Mr. Lovell in his deposition, and I believe that they were echoed at some point in the trial. That [19] may be counsel referring to it.

Mr. Lovell granted the company severance policy according to the needs and directions of management. It was not formally listed in the employees manual. Mr. Lovell did not consider severance to be a fringe benefit. In fact, no employee, however, who was terminated voluntarily was denied severance according to the testimony presented during this trial.

The human resources policy procedural manual gives guidelines for severance and exclusively indicates that they are not to be considered as a binding contract or promise, and the manual reserves to the company the right to make any changes in policy procedure and terminate any employee with or without cause. This appears in a disclaimer paragraph, P-38, the very first page, the plan introduces a new format of the manual.

In this respect I do note again P-15, which was a management entitlements memo sent to Mr. Levy, which indicates among the benefits they could get as a new member of the management team would be number five, "You will receive a copy of the headquarter's personnel policies and procedures manual." I take this as evidence that the policy and procedures manual, P-38, which claims that disclaimer was not circulated and promulgated among all employees,

and therefore is a disclaimer that is proven by the evidence in this case not to be known to all the employees.

[20] I find that management learned about the acquisition of American Electric on 11-13-91 and announced the proposed acquisition to all Thomas & Betts employees in Bridgewater on the next day. On the Monday after Thanksgiving of that year, 12-2-91, an announcement was made to the engineering department that the company was moving to Tennessee, and later that month management made arrangements to fly personnel who were invited to relocate to Memphis to check out the city and to do everything that management could to ease their transition.

The finding that is easiest to make in the whole wide world in this case is that certain employees were asked to relocate, others were not, and the employees who were asked to relocate were the engineers and certain other employees in product management.

Management characterized the refusal of the majority of the engineers to relocate as "unprecedented." This is accurate only to the extent that one of the overall circumstances facing Thomas & Betts was unprecedented.

Based upon the 1990 relocation of the electronics department to South Carolina there was a relatively smooth transition or relocation experienced by the company. However, the unprecedented feature in the circumstances facing the company and its employees in December '91 and January '92 was not the fact of relocation and was not the fact of an uprising on the part of employees, but the

perception by management that [21] its corporate decision was being threatened by the decision of certain employees not to relocate, and what was unprecedented was management's inaccurate prediction of the number of engineers willing to relocate permanently on very short notice.

I am not characterizing anybody as bad guy-good guy here. I'm saying that the evidence clearly established in my eyes the nature of the difficult circumstances facing management and the fact that no effort had been made, probably for reasons that management could defend if it was asked to, to consider what would happen if the majority of the engineers did not move down. It seemed to be taken as a matter of course. And the managers who testified on this issue, Mr. Lovell and Mr. Dunn in particular, were specific that no investigations had been undertaken as to how many would be likely to move, and no particular circumstance that might affect any of these personnel had been gauged or predicted were considered.

The confidential memo, P-36, that was circulated to managers and available to engineers affected by the relocation was drafted by Mr. Lovell, the writer of the Thomas & Betts severance policy, in order that managers could answer employees' questions. Managers used P-36 to do so. Employees were told that they would get their severance. The memo reflected that employees would get their severance. I find the language which indicates that very clearly.

Appendix F

Within a few weeks thereafter management recalculated [22] its original decision about offering severance to employees asked to go and unwilling to relocate, and management denied those employees severance on the theory that paying severance would offer a "departure incentive." The decision to do this was made by CEO Kevin Dunnigan, who described himself when he testified as the terminating manager for the purposes of deciding severance policy. He testified that he did not feel it was "appropriate" for the corporation to incentify people not to follow their jobs.

I find plaintiffs had no incentive to leave Thomas & Betts, and their departure even with severance package is a hardship in light of their distinguished careers and dedication to Thomas & Betts and in light of the advanced age of three of the plaintiffs.

Management offered a significant financial package to engineers who did relocate, including extra week's salary and full personal expenses including food for a period of time. These engineers were also compensated for any financial losses in connection with residential home sales.

Mr. Dunn testified that he did not feel it was necessary to offer the older engineers a guarantee of employment for specific period of time if they relocated because he believed the corporation expected and clearly stated in the employee handbook his expectation that employees, quote, were moved to locations either on a temporary or permanent basis when [23] the corporation asked them. I don't find this language clearly supports a requirement of relocation. I find that it supports the more natural locations within a site, and there

are several sites in New Jersey that were testified to, or even within a building or within a department.

In fact, the handbook is silent on the issue of the relocation. The average work experience of those accepting relocation is four years. The average work experience of those declining was 25 years of employment. This supports the lack of information gathered by management before proposing to the engineers that they will as a matter of course move to Memphis. Specific people were thought of in terms of putting the acquisition and relocation together, from the Lovell deposition.

Although Mr. Dunn initially testified relocation as fact of life at Thomas & Betts, when posed the question, he was unable to cite what the past practices of management were regarding circumstances like that. While he testified that he was following past practices, at his deposition he, like Mr. Lovell, had not encountered a problem like this. Further, in his testimony he was not able to establish personal knowledge regarding whether or not severance was paid to employees declining to relocate and was unable to recall other circumstances when he was a terminating manager in a situation akin to this one.

His testimony established that the corporation was not [24] harmed financially by the plaintiffs' decision not to relocate. It prospered in 1992 and has grown consistently thereafter. He established no studies or other similar efforts were undertaken before the merger to determine how many of the engineers considered "the cornerstone" of the policy of the corporation were apt to agree to relocate. Kevin

Dunnigan relied on his personal experience in assuming "we would not have a problem."

In the early weeks of December, after the merger and relocation were announced, Mr. Dunn testified that he had not focused on the issue of severance, and this was the same period of time that the Lovell memorandum, P-36, which did focus on severance, was being promulgated by management at Thomas & Betts, circulated and used by managers in explaining what the severance policy would be.

Then Mr. Dunn learned that a significant number of engineers were not intending to relocate or had serious reservations about it. Upon this information Mr. Dunn brought in Mr. Hunihan to replace Mr. Frye, its director of engineering, and he redefined the severance to be paid so as not to "incentivise" those declining to relocate.

When I say redefine the several to be paid, what in actuality he did was redefine who would be paid the severance to be paid. I'll correct the record to that extent.

Mr. Dunn responded affirmatively to the question about whether the company has a right to change its policies and [25] procedures vis a vis its employees retroactively. He said that it did. He initially testified that he reviewed and understood the corporation's severance policy, "I reviewed it many times when this policy was written," notwithstanding Mr. Dunn did not know the drafter was Richard Lovell and did not consult with Mr. Lovell as to how it might apply to the situation facing the corporation in 1991 and 1992.

Appendix F

Consistent with his authorship of the severance policy, it was in fact Mr. Lovell who was initially applying the severance to employees in the early weeks of December as evidenced by P-36.

Mr. Dunn was unequivocal about one thing, "We had to get the engineers to move because they were very important to our policy."

I've already indicated to counsel the exhibits that I have considered to be the critical ones in this case. In terms of the law, there are, of course, any number of decisions involving ERISA cases. Hozier, H-o-z-i-e-r, was the decision that I think was most frequently referred to by Mr. Pearlman when he wasn't talking about the Amatusio decision. Hozier versus Midwest Fasteners Inc., 908 11 2d, Third Circuit, decided 1990.

Mr. Lewis emphasized that management has the right to wear two hats. In discussing the law with counsel, I asked for those decisions and those arguments that could in fact support [26] what appeared to be a split between the parties as to what the applicable standard of review or legal obligations were with respect to management's decision.

In weighing the evidence, assessing it, and trying to find the fairest analysis of these facts, I've just laid forth in terms of the applicable law. I have concluded the Hozier analysis is very useful, or if Mr. Pearlman or Mr. Lewis were arguing it, I wasn't concentrating on what I find to be a useful part of the Hozier decision, and that is that it is very clear under Hozier that management has the authority to change a

severance policy. Management has the authority to wear a management hat.

The decision to amend or even cancel a welfare benefit plan as opposed to vested employee benefit plan is not an act or plan administration, according to Hozier, that would require that the employer act as a fiduciary. It is a management or business decision that appears at 908 F. 2d 1161 and 1162. Indeed, that has been the point that Mr. Lewis has been making on behalf of the defendant employer pretty much throughout.

Considering the decisions made with respect to payments of severance to these plaintiffs as management decisions, we did not want to incentivise them to stay. Their decision to stay was in fact a detriment to us, and we have the right to act in accord with our own interests.

Hozier stands for the principle that management has the [27] authority to change severance policy. The question that Mr. Pearlman raised and relied upon Amatusio for clarification is, could management eliminate the policy completely as to these employees, or in trying to change it, was management facing something of a contractual nature and therefore was management in fact fiddling with vested interests?

Mr. Pearlman, you used the example, you can change somebody's pay, but up until the day that you change the pay, you have to pay them what you owe them per hour and then you can lower the pay.

Appendix F

The question in this case is, can management eliminate severance to these employees whose length of employment creates what appears to be an entitlement under the severance manual or the policy contained in P-38? That issue is what the Amatusio case against Gandel, G-a-n-d-e-l, 964 F. Supp., 253, a February 4, 1998 decision of Judge Irenas.

In fact, interestingly enough, in the Hozier decision at 1162 there appears to be language which seems to be a predicate for what Amatusio moves on to. Judge Becker writes, "Finally, plaintiffs might be correct that an employer's purported amendment is invalid if the original plan's governing documents fail to reserve an amendment or if employees are never notified of the amendment, or if an employer fails to follow certain formalities."

There is other language that would suggest there might [28] be restrictions based upon management to move in the direction of canceling or amending severance policies.

However, in looking at the facts of this case which are basically undisputed, as we said all along, the problem is not what happened, but the import of what happened. The question that I came to was, is it important to the decision to say that the case turns on Amatusio contract principles?

If as P-37 shows, P-37 being the memo that went to all the employees, the same date as the January 6 memo that went to each of the plaintiffs there was the all electrical division memo that said we are paying severance to all people who are not asked to relocate. As that memo shows, as to all employees not asked to relocate, management paid severance.

Appendix F

I find that the most intellectually, to me, honest way to look at this case and the way that preserves the arguments of all sides, which I think from each side's respective position are made honestly, is that management never did change and never did amend the severance plan. It paid it. It paid it to all but at certain handful of employees.

Rather, instead of changing or amending the severance policy, what management is doing in the case at bar was exercising a management decision to classify one set of employees, the engineers, as key employees, and without regard to their individual circumstances categorize their decision not to relocate as a resignation. In other words, management was [29] making a management decision insofar as it applied the severance policy. I don't find it was changing or amending or canceling the severance policy.

If that is so, the issue then becomes if management is free to classify employees for voluntary or involuntary purposes on its own terms under ERISA, can management do that? Can management say that we are classifying these employees on terms that are beneficial to us as terminating voluntarily? Basically we need them, we are bringing their jobs to Memphis, Tennessee, they are not following, therefore they are resigning.

If you will notice, the action undertaken by the plaintiffs is inaction, the classification of that inaction is as resignation is made by management, and there is no language in any of the written policies plan or application of the written policy that supports the determination that it is deemed to be resignation, and the admitted purpose of that characterization

from Mr. Dunn was to deincentivise those wishing not to relocate from following through with their decision not to relocate.

For Hozier purposes and for purposes of whether the hat that management wears in making that decision, which is clearly a management hat, is, can management wear that hat at that time in exercising that function? The analysis turns then on whether that act is one of administration of a welfare benefit plan or one of management?

[30] In moving into this analysis I begin with the unremarkable observation that the acquisition significantly affected the terms and conditions of all the employees' jobs at Thomas & Betts. I find from the outset the response, the offer of the severance policy of Mr. Lovell was consistent with administering the plan for the benefit of employees whose entitlement was unquestioned. See P-36.

Those who didn't relocate and were no longer to be Thomas & Betts employees were intended to get severance by Mr. Lovell's application of the plan. The only consideration that Mr. Lovell undertook was how an employee declined would be further benefited if that employee participated in transition work. That is set forth in the bonus that was offered for each week of severance or each month of severance work, I think it's a week. One of the plaintiffs got 11 weeks, one of the plaintiffs got nine weeks.

I find too that consistent with this administration of the severance plan that was undertaken by Mr. Lovell just days

after the relocation was announced were the oral promises by on site regular management who were further administering the plan benefits and who never distinguished between the invited and the uninvited.

The management decision in this case which isolated the engineers who declined to transfer out of all others directly affected the administration of severance to all employees who [31] did not relocate, and as such I find that it was a breach of fiduciary duty to administer the plan.

I find the act of applying the severance plan benefits to all employees, whether they were going or staying, whether they were in transition, not in transition, was an act of welfare plan administration, and in so undertaking that act I find under the Hozier analysis that the company had a fiduciary duty to administer the plan with the benefit of the employees in mind and not its own management welfare in mind.

I find therefore that by arbitrarily denying welfare benefits to certain employees whose jobs were significantly affected by the acquisition and conferring those benefits arguably to people equally affected by the acquisition was a breach of that duty.

I note that by way of example one manager in the customer service department bargained for and got an agreement from management that her employees would still get their severance if they received an offer from management which she suggested management consider and turned down the management offer because she saw the threat were management to withhold the benefits.

The fact that management agreed to that is a further example that it was considering its own welfare because perhaps Ms. Kemp was right and was making an arbitrary distinction at that point from the distinction that it was making, that is, [32] earlier that all invited people who didn't accept would be denied severance. In other words, it was the use of the severance plan that was a management oriented use that I am objecting to as arbitrary because in fact it was that decision to use for the benefit of management in the act of administering centering that I find flies in the face of the fiduciary duty identified by Hozier.

In terms of arbitrary and capricious conduct, I had to ask myself what could be more arbitrary and capricious, which is the review standards we are talking about in fiduciary duty, than identifying loyal, outstanding employees such as these four plaintiffs and then treating them worse than any other group. That is the anomaly.

If I were to go according to the desires of management, I would be left with this eternal anomaly that by the very quality and high standing afforded or accorded to these people's worth, they suffered the most when they chose family concerns, some of which quite tragic, over following management.

I find too that management chose not to sweeten the deal in any way. Mr. Pearlman made the point, it is correct, I was unaware of how correct it was until I read that extra paragraph on the memo sent to each. Management chose not to in any way insure to confer an extra benefit upon these plaintiffs by particularizing their circumstances and responding to

reasonable concerns, will I have a job two years from now? [33] Management chose to say you are still an at will employee, and the only difference is you are working in Tennessee and I find that is not an unreasonable position to take.

I find too that it is anomalous, arbitrary and capricious that management was withholding severance for the very first time in a situation that bore remarkable resemblances to the 1990 transfer solely on the basis of its position that it was defining these employees as critical ones. That had never happened before.

Arguably, if I were to pursue an Amatusio analysis, I could say that management was reforming a unilateral contract, and the Amatusio case suggests I can find here a different kind of contract, one that required an extra measure from the employees, and that is relocating management in order to preserve the right to severance should one be laid off, or give up severance if you reserve to yourself the right to decline.

Both approaches, the approach that I have taken from Hozier, which is management's inability to choose management's interests over these employees in administering the severance benefits, and the Amatusio analysis, and there are a lot of close similarities between this case and Amatusio, and let me point out that if we look at the facts, there is the manual that is not circulated to all the employees in the Amatusio case as is the case with P-38. There is the disclaimer that was not made known to all the employees because of the failure to [34] promulgate it to

everybody. There is the distinction in classes of employees and there are meetings in Amatusio that are described where policy is considered, and I guess probably the big distinction between Amatusio and this case is the fact that money and the inability to pay the various classes of plaintiffs in Amatusio was the motivating reason.

Here the motivating reason can bring it itself down to money, but much more the fact that management made a decision, that it became reliant upon personal decisions of its employees which it simply did not weigh ahead of time, and then when things did not go, although reasonably they could have been believed not to go the way management wanted it to go, management began fiddling with its administration of the plan, in a sense, action less tolerable than the action in Amatusio which is very much a matter of financial, in management's eyes, a necessity.

As indicated, both the Amatusio approach and the Hozier approach that I'm adopting focuses on the actions of management that are so self-protective as to violate the spirit of ERISA. I'm persuaded here the uncontroverted testimony supports my analysis that in an effort to combat a threat to its management decision to require the Tennessee based company, management decided in midstream to administer its severance policy in a way that perverted the spirit and intent of the severance plan under ERISA and its own written policy.

[35] Another unremarkable observation that I can drop here is that the severance policy was designed to attract employees to stick with their Thomas & Betts employment.

Appendix F

Why else modify the severance so as to improve it with a rule of 80? Why else circulate it other than as counter balance to that at will employment which might affect and did affect arguably a group of engineers that was three times as big as the core group of engineers that remained. Layoffs were a fact of life for Thomas & Betts, not relocations, and they were layoffs that are tolerated, understood, countenanced and accepted by those affected because the severance plan was known and was applied uniformly all throughout the testimony, all throughout the history of Thomas & Betts as it is relevant to the issues at hand.

The conduct of management which is violative of the spirit and intent of the severance plan was not conduct that amended the policy, but conduct that administered so as to — and I use the word advisedly here — engineer compliance by certain employees with demands by the employer that that they relocate, a term of employment that was not defined in the written policy promulgated to employees, a termination policy that was not promulgated but otherwise made money for management. Relocation was not part of the fabric of the policy that was written and the policy see that was uniformly applied.

The first articulation that this mode of administering [36] the plan was the 1-6-92 memo to the four employees I spoke about and to other employees who chose not to go. It was admittedly made, this articulation of deeming a failure to relocate as a resignation, in order to deincentivise the employees who are unwilling to relocate for personal reasons that admittedly were never considered or foreseen by management. That failure to particularize the circumstances

of each employee and to administer the policy accordingly flies in the face of the discretion that is afforded the terminating managers in the plan policy which was in fact designed to increase, not decrease punitively the severance benefits available.

You will recall that I was trying to parse at one point the language in the category one-category two which seems to echo language reserving to terminating managers the ability to exercise some discretion in applying the severance plan. It provided that even where there is a dismissal for cause, some form of severance might be applied. I find that is telling language because the manual, P-38, is consistent in the application of the benefit of severance so as to take into consideration the individual circumstances of the employee at hand and even ameliorate what might otherwise be a denial of severance where a dismissal is for cause.

Overall then, I find the acquisition of American Electric created a termination event that required administration of severance plan to all employees. Those [37] employees choosing to accept and an an offer of continued employment were not terminated. Those declining the offer were effectively terminated under the circumstances established by the evidence, which include geographical distance of the relocation, the certainty of continued employment unameliorated by management, and foreseeable effects on family life which was specifically not considered on a individual basis by management.

There is some argument that the cases that were cited all the dealt with unacceptable conditions that were of a work

nature. I find that pursuing that line of reasoning in saying that the effect was inconsiderable on these employees because they would have the same work environment, same people around, the same duties, the same tasks is inconsistent with the requirements in 1998 of employers and employees to factor in the impact of job situations on personal life. We have Family Leave Act, we have any number of considerations that are taken routinely in weighing employment decisions, employment changes, and to say now that this particular move need not encompass the effect upon the employee I find would be anachronistic.

The decision to accept or not accept transition was one within the discretion of the employee. I find that these particular employees established that they were not able to accept on a reasonable basis a transition — I'm speaking now of Mr. Noorily and Mr. Nastawa — and that they explained that clearly. I find too, and again this is something that was a [38] little bit buried, but in the letter to Mr. Levy and Mr. Deck that outlined their transition package, there is language to the effect that by accepting transition, each man was agreeing to work a total of one day in Memphis per week of employment. That was part of the policy and that supports the unavailability of the transition package to Mr. Noorily and Mr. Nastawa. I find their decision to turn it down was a neutral one in keeping with their family circumstances, the decision not to offer them equally neutral, and I don't find that management was treating them unfairly, but simply responding to the very clear statements that they were unavailable for transition.

Appendix F

The effective termination dates as to each of the plaintiffs will be the date of their last employment. I specifically reject management's distinction between invited employees and uninvited employees as a basis for the disparity of administration of severance benefits on grounds that this was a breach of fiduciary duty to administer the plan fairly in accord with its written severance plan in P-38 and for the benefit of the employees.

I find instead that management's withholding of these employees' severance pay was based on punitive coercive motives designed solely to protect and benefit the employer to the detriment of plaintiffs, and I refer again to the unequivocal statement of Mr. Dunn, quote, we had to get the engineers to move because they were very important to our policy, and as part [39] of that way of getting the engineers to move, I find that management made the decision to administer the severance plan differently as to these plaintiffs, and that these plaintiffs were in fact entitled to severance for the reasons that they gave in declining the relocation.

That leads to the findings of the Court with respect to the entitlement of the plaintiffs in the findings of fact that are proposed by Mr. Pearlman beginning on paragraph 76. The damages are set forth as to each plaintiff. I have already indicated that the $22,000 per plaintiff did not seem to be supported by any of the evidence. I've knocked that out of the findings of the Court.

The reduction in pension benefits, Mr. Noorily was required to retire early in order to obtain medical insurance

through the pension plan, as a result of which his pension was reduced, and I believe that that same explanation of reduction in pension benefits is set forth in Mr. Deck's and Mr. Levy's statement of damages.

Is that correct, Mr. Pearlman?

MR. PEARLMAN: It is, your Honor.

THE COURT: Why would that specific inclusion be made? The decision was made, I can't rule, I've accepted the reasons, and in fact two out of these three there is the unequivocal, I can't, I won't, I'm not going anywhere. Isn't the decision then to take early retirement very personal? They could have [40] purchased Cobra, they could have done any one of a variety of things. I don't find management's decision not to pay severance had anything to do with their decision. It was a personal decision just as the other decision was personal.

MR. PEARLMAN: The reason for that is that under the severance plan in P-38, one of the things to which each of these gentlemen was entitled was medical insurance for the period for which severance would have been paid. Mr. Noorily's case, for instance, approximately one year.

THE COURT: Why can't that be a part of the damages as opposed to the decision that he made in order to cover that?

MR. PEARLMAN: We have given your Honor — the answer it can. We have given you two calculations. One, the

cost according to Thomas & Betts documents of the medical insurance that they could have gone out and purchased. The other is what it cost them by taking retirement early, because by taking retirement early they were able to get medical insurance from the plan itself. They are alternate options for your Honor to choose. They are clearly entitled to one or the other. We have given you two methods of doing the computation.

THE COURT: Consistent with my belief that the severance plan should have been offered to them under its terms, I'm going to choose the one that relates to the cost to them of the health insurance.

I'll hear from you, Mr. Lewis, if you see any reason [41] why not, but I'm trying to be completely logical in terms of findings. It should have been offered. Getting into the personal decision making of the party is going into an area, not so much speculation, but is this really foreseeable? I don't find that it is foreseeable. I'm choosing the other route.

MR. LEWIS: Consequential damages are outside the realm of ERISA.

THE COURT: Is Mr. Pearlman wrong? I believe that there are medical benefits that are offered. I'm not absolutely sure. My understanding was that medical benefits would go on for a period of time. I'm not sure if it was the entire time that severance was payable or a 60-day policy, Mr. Pearlman.

In terms of preparing the order I'm going to look to counsel to submit a statement of damages. I'm telling you

what I want in it, and what I want in it is basically what that plan would have provided for, the financial amounts as opposed to either or, and personal decisions the plaintiffs made.

MR. PEARLMAN: It is not consequential damages because it is part of the plan itself. The medical insurance is part of the plan.

THE COURT: The bright line is what the plan provides.

MR. LEWIS: The medical benefits, and also, these people were given medical benefits during the period of time they were in transition as well.

THE COURT: That would be an offset. But remember my [42] finding is that while they were in transition they were let go on September 30, and that's when, as far as Mr. Levy goes, he's a September 30th person, his severance plan pops in at that time, and Mr. Deck worked through June and his severance plan popped in at that time. The outplacement goes off and the medical insurance.

Entitlement to any further damages relates to the issue of counsel fees. Correct?

MR. PEARLMAN: There are two issues; one is the issue of interest, the other is the issue of counsel fees. I don't know that counsel fees is necessarily an issue of damages. I'm certainly entitled under the statute.

THE COURT: Sure. On the issue of interest, let me hear from counsel.

MR. PEARLMAN: I think that the law and the — we cited in our brief and our proposed findings that it is discretionary with the Court. Certainly the question of prejudgment interest is discretionary with the Court.

In this circumstance we are dealing with a situation where the companies have use of this money since 1992. Its had the benefit of several hundred thousand dollars of these people's money during that period of time. This was a purely economic transaction as far as the company is concerned. They withheld money, had the use of it, plaintiffs did not have use of it. They made an economic decision for economic purposes and [43] they have had the use of this money, and I think as a matter of equity, but I think as a matter of law as well, your Honor ought to award the prejudgment in for that reason, to make these people whole by giving them money they have been deprived of for six years. You have to give them the interest on top of it otherwise they are not made whole, otherwise you reward the company by saying you have had the use of the money for all that period of time, but, what the heck, you have not much to lose here. Over that period of time Thomas & Betts probably turned that many dollars over themselves in simply profitability and the use of the money.

I also suggest with respect to the interest that an appropriate number is as we've indicated. The appropriate prime rate or the Internal Revenue Service rate under Section 6621 of the Code, but I think nine percent is a fair number,

again because they have the money and they made an economic decision that your Honor characterized as arising out of the punitive and coercive motive. They wanted the money and to force these people to do something your Honor found they didn't have the right to do that, and the only way that these gentlemen can be made whole is to give them the equivalent of what they would have had had they gotten the money in 1992, which is to give them interest on it, otherwise they are being made half whole.

THE COURT: Mr. Lewis?

MR. LEWIS: Your Honor, first of all, these employees [44] were, all of them, were offered a position with the company. Nobody deprived them of their job. They had their job.

THE COURT: Take it from my findings which may not be in agreement with what you're saying. I'm talking about the discretion of the Court in light of the findings.

MR. LEWIS: This is a severance payment that was due for maintaining their standard of living during a short period of time while they were looking for another job. These people were given transition. They were given an opportunity to work. They were given an opportunity to look for another job during that period of time, and they were given an opportunity to get a full-time job if they wanted that. And contrary to everything that they said, at this point we think they were treated perfectly right and perfectly in keeping with what the severance policy was all about, which was simply to maintain them for a period of time, to maintain

their standards of living while they were looking for another job, and that's all.

Therefore we don't feel that this is money that was bank money. This was not — despite everything that may be inferred here, this was not a vested right. This is not like a pension. This was not funded, and therefore it was not a fair amount.

THE COURT: I'm not following the Amatusio reasoning. I said that I could under the facts if I were so inclined, but understand I'm finding that we don't have to get into vesting, [45] we don't have to get into whether they were constructively discharged or not.

I find the company plan was a beneficial plan, that it had been applied beneficially throughout the years, that it reserved to management's administration of the plan or benefits oriented than punitive oriented applications of the plan.

I find that in this case it was a decision to withhold the plan from these people that's objectionable, not whether or not they had vested benefits. I just have to go to whether or not there was severance that was paid in the past and to others at the same time and wasn't paid to those folks.

We are not getting into vesting. I'm looking at the Court's discretion with respect to prejudgment interest.

I will indicate in probably two paragraphs tomorrow which way I'm going to go. It's seven o'clock, and I've heard

your arguments and I don't want to make a knee jerk reaction at this time.

I will be proceeding from the basis, however, of these findings, the purpose of the severance which I expect you to say, which is an important consideration in light of the testimony given as to what the company did after their jobs ceased with Thomas & Betts. And what I don't want to do is move into the area of if I find that management was being punitive and coercive, I don't believe that ERISA calls for the Court to be punitive and coercive. I'm trying to give myself some space [46] to make a decision that's fair along these lines, and I'll let you know tomorrow.

MR. LEWIS: I want to clarify one thing. You talked about these people as being only people that did not get severance. These people — the product managers and the product engineers were the ones that were classified. That was the classification for those people. The customer and service department was not in it. The model makers were not in it. It was just this group that was classified.

THE COURT: Classified, understand, just so I'm clear, I find that classification was a management oriented business classification designed to benefit management. The irony is that it was valuable and dedicated employees who fell into this category, and that by falling into this category they were exposed to the most harm in terms of the next decision management made. That's my thought.

It is not a classification that came with job grade, you are now a critical employee. This was flowing from

management's decision to acquire a company that apparently did not have an engineering department that was staffed. I believe it was in Mr. Dunn's testimony or somebody's testimony of a — I think it was he who said that we acquired this company and we knew we had to place people there, and they weren't there and I needed them there. That's what gave rise to the classification, not a job task that these folks knew about.

[47] Don't reargue the case. I'm trying to be clear so that everybody understands the reason.

MR. LEWIS: These people were classified as product engineers and product managers. The product managers all went. The product engineers had a problem.

THE COURT: All right, you're arguing again. I understand all that.

I'm saying that the classification that led to the management decision was a management classification designed for management's benefit as a result of management's decision to acquire this company which created these needs. That to me is critical because that is what led to the distinction between administering for the benefit of the employees and classifying for the benefit of management in the act of administration, which flies in the face of the ERISA duties.

We are getting into debate. That is not the purpose at this point in time.

Appendix F

All right, everybody, I'll let you know my decision on prejudgment issues. I'll expect a certification from you as regards attorneys fees.

MR. PEARLMAN: Thank you.

* * * *

APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED OCTOBER 19, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 98-6298, 98-6328,
and 98-6432

PETER NOORILY; RAYMOND P. NASTAWA

v.

THOMAS & BETTS CORPORATION; EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION

(D.C. Civil No. 93-2227)

SIDNEY LEVY

v.

THOMAS & BETTS CORPORATION; EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION

(D.C. Civil No. 93-2228)

WILLIAM O. DECK

v.

Appendix G

THOMAS & BETTS CORPORATION; EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION

(D.C. Civil No. 93-2229)

Thomas & Betts Corporation; Employee Benefit Plan of Thomas & Betts Corporation,

Appellants in No. 98-6298

PETER NOORILY; RAYMOND P. NASTAWA

v.

THOMAS & BETTS CORPORATION; EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION

(D.C. Civil No. 93-2227)

SIDNEY LEVY

v.

THOMAS & BETTS CORPORATION; EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION

(D.C. Civil No. 93-2228)

WILLIAM O. DECK

v.

Appendix G

THOMAS & BETTS CORPORATION; EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION

(D.C. Civil No. 93-2229)

Peter Noorily; Raymond P. Nastawa;
Sidney Levy; William O. Deck,

Appellants in No. 98-6328

PETER NOORILY; RAYMOND P. NASTAWA

v.

THOMAS & BETTS CORPORATION; EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION

(D.C. Civil No. 93-2227)

SIDNEY LEVY

v.

THOMAS & BETTS CORPORATION; EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION

(D.C. Civil No. 93-2228)

WILLIAM O. DECK

v.

Appendix G

THOMAS & BETTS CORPORATION; EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION

(D.C. Civil No. 93-2229)

Thomas & Betts Corporation; Employee Plan of Thomas & Betts Corporation,

Appellants in No. 98-6432

On Appeal from the United States District Court for the District of New Jersey (D.C. Civ. No. 93-02227/28/29)

SUR PETITION FOR REHEARING

BEFORE: BECKER, *Chief Judge*, and SLOVITER, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, MCKEE, and RENDELL, *Circuit Judges* and STAFFORD, *District Judge*

The petition for rehearing filed by the appellees, Peter Noorily, Raymond P. Nastawa, Sidney Levy, and William O. Deck, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied. Judge Stafford's vote is limited to voting to deny rehearing before the original panel.

Appendix G

BY THE COURT:

s/ [illegible]
Circuit Judge

DATED: OCT 19 1999

Supreme Court, U.S.
FILED
FEB 29 2000
CLERK

(2)

No. 99-1210

In The

Supreme Court of the United States

PETER NOORILY and RAYMOND P. NASTAWA,

Petitioners,

-and-

SIDNEY LEVY,

Petitioner,

-and-

WILLIAM O. DECK,

Petitioner,

v.

THOMAS & BETTS CORPORATION and EMPLOYEE BENEFIT PLAN OF THOMAS & BETTS CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

PAUL Z. LEWIS
Counsel of Record
LEWIS & MCKENNA
Attorneys for Respondents
82 E. Allendale Rd.
Saddle River, NJ 07458
(201) 934-9800

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964

Z6PP

QUESTION PRESENTED

Whether the Third Circuit erred in ruling that in an ERISA welfare benefit plan whose terms allow for the terminating manager to exercise business discretion to grant severance benefits only when the manager determines they are appropriate, the manager may deny such benefits to Petitioners who refused to relocate with their jobs, because the manager determined it was not appropriate to grant severance to key personnel that the Company believed were critically needed.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 7

CONCLUSION 19

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Adams v. Avondale Industries, Inc., 905 F.2d 943 (6th Cir. 1990) 8, 13, 17

Adams v. LTV Steel Corp., 936 F.2d 368 (8th Cir. 1991) 14, 15, 17

Administrative Committee v. Robinson, 164 F.3d 981 (6th Cir. 1999) 17

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) 7, 8

Ames v. American Nat. Can Co., 170 F.3d 751 (7th Cir. 1999) 13

Anderson v. Ciba-Geigy, 759 F.2d 1518 (11th Cir.), *cert. denied*, 474 U.S. 995 (1985) 17, 18

Averhart v. U.S. West Management Pension Plan, 46 F.3d 1480 (10th Cir. 1994) 15

Bair v. General Motors Corp., 895 F.2d 1094 (6th Cir. 1990) 16

Belade v. ITT Corp., 909 F.2d 736 (2nd Cir. 1990) 9, 14

Berger v. Edgewater Steel Corp., 911 F.2d 911 (3rd Cir. 1990), *cert. denied*, 499 U.S. 920 (1990) 11, 13, 15, 16, 17

Blaw Knox Retirement Plan v. White Consolidated Industries, Inc., 998 F.2d 1185 (3rd Cir.) *cert. denied sub nom. White Consolidated Industries, Inc. v. Pension Ben. Guaranty Corp.*, 510 U.S. 1042 (1993) 11

Curtis-Wright Corp. v. Schoonejongen, 514 U.S. 73 (1995) 8

TABLE OF AUTHORITIES – Continued

Page

DiFederico v. Rolm Co., ___ F.3d ___, 2000 WL 31797 (3rd Cir. 2000) 3

Dzinglski v. Weirton Steel Corp., 875 F.2d 1075 (4th Cir.), *cert. denied*, 493 U.S. 919 (1989) 9, 11, 12, 13, 14, 15, 16

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) 7

Fletcher v. Kroger Co., 942 F.2d 1137 (7th Cir. 1991) 18

Hamilton v. Air Jamaica, Ltd., 945 F.2d 74 (3rd Cir. 1991), *cert. denied*, 503 U.S. 938 (1992) ... 3, 10, 14, 16, 18

Hickman v. Tosco Corp., 840 F.2d 564 (8th Cir. 1988) .. 8, 11

Hlinka v. Bethlehem Steel Corp., 863 F.2d 279 (3rd Cir. 1988) 8, 9, 10, 14, 15, 17

Holliday v. Xerox Corp., 732 F.2d 548 (6th Cir. 1984), *cert. denied*, 469 U.S. 917 (1985) 10

Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155 (3rd Cir. 1990) 8, 9, 12

Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 119 S. Ct. 755 (1999) 8, 11, 13

Izzarelli v. Rexene Products Co., 24 F.3d 1506 (5th Cir. 1994) 9, 11, 19

Joanou v. Coca-Cola Co., 26 F.3d 96 (9th Cir. 1993) 8

Johnson v. Georgia Pacific, 19 F.3d 1184 (7th Cir. 1994) 9

Jones v. AT&T Co., 798 F. Supp. 1137 (E.D.Pa.), *aff'd*, 981 F.2d 1247 (3rd Cir. 1992) 12

Lockheed Corp. v. Spink, 517 U.S. 882 (1996) 7, 9, 10, 11, 18

TABLE OF AUTHORITIES – Continued

Page

McGann v. H&H Music Co., 946 F.2d 401 (5th Cir. 1991) *cert. denied sub nom. Greenberg v. H&H Music Co.*, 506 U.S. 981 (1992) 8

McGath v. Auto-Body North Shore, 7 F.3d 665 (7th Cir. 1993) 7, 11

McNab v. General Motors Corp., 162 F.3d 959 (7th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S. Ct. 1762 (1999).....8, 9, 11, 13, 17

McNab v. General Motors Corp., 987 F. Supp. 1115 (S.D.Ind. 1997), *aff'd*, 162 F.3d 959 16

Morse v. Stanley, 732 F.2d 1139 (2nd Cir. 1984).....11, 19

Murphy v. International Bus. Machines, 23 F.3d 719 (2nd Cir.), *cert. denied*, 513 U.S. 876 (1994) 16

Nazay v. Miller, 949 F.2d 1323 (3rd Cir. 1991) ... 11, 12, 14

Pilot Life Ins. Co. v. Dendeaux, 481 U.S. 41 (1987) 7

Sandoval v. Aetna Life & Cas. Ins. Co., 967 F.2d 377 (10th Cir. 1992)..... 3

Sengpiel v. B.F. Goodrich Co., 156 F.3d 660 (6th Cir. 1998)..... 8, 10, 11, 12, 13, 17

Severs v. Allied Constr. Services Inc., 795 F.2d 649 (8th Cir. 1986)..... 19

Shaw v. Delta Air Lines, 463 U.S. 85 (1983)..... 7

Siskind v. Sperry Retirement Program, Unisys, 47 F.3d 498 (3rd Cir. 1995).....11, 12, 13, 14, 19

Systems Council EM-3 v. AT&T Corp., 159 F.3d 1376 (D.C. Cir. 1988)..... 11

Trenton v. Scott Paper Co., 832 F.2d 806 (3rd Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988).....10, 14

TABLE OF AUTHORITIES – Continued

Page

Walling v. Brady, 125 F.3d 114 (3rd Cir. 1997) ... 11, 12, 13

White Consolidated Industries, Inc. v. Pension Ben. Guaranty, Corp., 510 U.S. 1042 (1993) 11

Woolsey v. Marion Laboratories, 934 F.2d 1452 (10th Cir. 1991) 19

Young v. Standard Oil (Indiana), 845 F.2d 1039 (7th Cir.), *cert. denied*, 488 U.S. 981 (1988) 13

FEDERAL STATUTES

29 U.S.C. §1051(1) 3

29 U.S.C. §1081(a) 3

29 U.S.C. §1104 18

29 U.S.C. §1109 9

29 U.S.C. §1132(a)(1)(B) 1, 9

STATEMENT OF THE CASE

Petitioners have presented a distorted recitation of both the facts and the law. The Third Circuit's unanimous decision is in complete harmony with all other Courts of Appeals relating to this subject. The decision is also in harmony with United States Supreme Court precedent. There are no conflicts between the Third Circuit's opinion and the Supreme Court's teachings.

This is a case brought exclusively under 29 U.S.C. § 1132(a)(1)(B) of the Employment Retirement Income Security Act (ERISA) arising out of a decision by Thomas & Betts Corporation (hereinafter "T&B" or "Company") to relocate its Electrical Division from New Jersey to Memphis and the Company's determination that two groups of key employees (product engineers and product managers) – approximately 35 of 200 employees at Division headquarters – were essential to the operations of the Division and, as such, their positions would be relocated. The single purpose of T&B's severance plan was "to assist former employees in maintaining their standards of living while securing new employment." The plan was not intended to operate as a reward for service but only as a financial bridge if the employee was terminated, not if the employees left on *their own terms*. The terms of the plan provided for payments of benefits only when the termination was "involuntary" and the terminating manager determined that the "granting of such pay [was] appropriate." (App. B at 16a).

In this case, the terminating manager was the President of the Company who determined that severance would not be paid because he considered these

employees to be "key" employees and determined that it was in the Company's best interest that they remain. As the Third Circuit noted, the decision was impartial and there was no discriminatory motive. (App. B at 26a). The Third Circuit recognized that it was equally undisputed that the manager considered these engineers vital to the Company and vital to the consummation of T&B's anticipated acquisition of American Electric, a manufacturer of electrical products and accessories headquartered in Memphis. (App. B at 21-22a, n.5).

Although it originally anticipated in early December, 1991, that the two groups would relocate essentially intact, Company management learned by the end of that month that at least a majority of the engineering group, unlike the product managers (all of whom relocated), were expressing reluctance to make the move. Management believed that it was crucial for these groups to relocate. Otherwise, the Company would either have had to dislocate its engineering department from the rest of the Division, or go to Tennessee with a decimated engineering department – results that the Company perceived would seriously threaten the welfare of the Company and all of its employees.

The Court of Appeals properly held that there was nothing inappropriate or arbitrary about the Company's decision not to encourage employees it regarded as critical from terminating their employment. In doing so, the Third Circuit, in carrying out its plenary review, concluded that the District Court's characterization of the terminating manager's determination to withhold severance pay as "punitive" was legally erroneous. (App. B at 24a). As the Third Circuit noted, Petitioners were being

actively solicited by the Company to be *retained*, not *discharged*, by the Company. (App. B at 26a).

Contrary to Petitioner's assertion, the decision does not in any manner encroach upon the protection given employees for welfare benefits. Indeed, the Third Circuit's holding is consistent with the objectives for which ERISA was enacted. The decision acknowledges the need for flexibility in these kinds of plans – a flexibility mandated by Congress and by all of the Circuits designed to *encourage* plan formation – that Petitioners have completely ignored.

Because the Third Circuit confirmed that it had plenary review, its conclusions with respect to the proper application of ERISA law to the facts and actual circumstances surrounding that plan are conclusive. *DiFederico v. Rolm Co.* ___ F.3d ___, 2000 WL 31797 (3rd Cir. 2000); *Sandoval v. Aetna Life & Cas. Ins. Co.*, 967 F.2d 377 (10th Cir. 1992); *Hamilton v. Air Jamaica, Ltd.*, 945 F.2d 74, 77 (3rd Cir. 1991), *cert. denied*, 503 U.S. 938 (1992).

However, in an effort to factually blur the record and camouflage the legal distinction that the Third Circuit in this case and other Circuits have clearly established, Petitioners have made a number of misstatements regarding the record and the Third Circuit's rulings, matters which are central to this litigation. Petitioners had not "accrued" any rights as they suggest (Pet. Br. at 4); this case deals with a welfare benefit plan, which has been very deliberately exempted from the statute's funding (29 U.S.C. § 1081(a)(1) and vesting (29 U.S.C. § 1051(1)) requirements. Benefits such as these do not "accrue." Contrary

to Petitioners' statement, there was no evidence that management was "taking out its frustrations" by "depriving" these Petitioners of benefits. The Court of Appeals found that this was a case involving "nothing more than an employer determining that it is not appropriate to grant severance benefits to employees leaving their employment when the employer wishes them to remain." (App. B at 26-27a).

Likewise there was no evidence that the Company had any "longstanding practice" to pay benefits to employees in this kind of situation; even the District Court observed, which the Third Circuit acknowledged, that the Company had never been faced with this kind of situation before (App. F at 64a). And, as the Third Circuit noted, this was a perfectly acceptable decision for the manager to make in a situation where the Company was doing anything *but* setting these employees adrift (App. B at 26-27a).

Significantly, Petitioners have also seriously misstated and distorted the language and operation of the plan. Petitioners persistently, but inaccurately, describe the Company's terminating manager as the "administrator." The Third Circuit ruled that the plan had explicitly given discretion to determine eligibility to T&B "through its terminating manager rather than to an administrator through its Corporate Benefits Committee." (App B. at 17a). It also determined that the Company could create a plan that furthered its business interests by retaining discretion to determine eligibility according to the plan's terms. In this case, the plan was structured from the outset to provide for an award of severance benefits only

if the termination was involuntary and the "terminating manager", not the administrator, determined that the "granting of such pay [was] appropriate."[1]

Petitioners also misstate the Third Circuit's ruling in an effort to support its accusation that the court had established a "new standard." In its quotation from the decision, Petitioners deliberately truncate the court's statement that an employer does not act as a fiduciary "when designing a plan or making business decisions *allowed for by a plan* . . . "[2] This is not a generic matter of "making business decisions" as Petitioners would have it, but of making business decisions *allowed for by the plan*. The Third Circuit has not developed a "new standard." The legal standard it applied is the same standard that every Circuit that has addressed the question has applied, *infra*, pp. 13-15.

While Petitioners may not agree with the ruling, to claim that the Third Circuit has established a "new standard" is disingenuous. It is the Petitioners that have attempted to create a "new" standard, one that makes each employee's personal predelictions paramount to any considerations for the welfare of the Company, the sustainability of the plan itself, or the employee workforce as a whole. Petitioners' standard would effectively give employees a license to always recover. Consequently, it

---

[1] Section 5.2 of T&B's "Electrical [Division] Human Resources Policies & Procedures"

[2] Petitioners omitted the words emphasized above, language expressly inserted by the Third Circuit in its Order of October 18, 1999 amending the August 25, 1999 opinion (App. A at 4a).

would utterly foreclose a sponsor's ability to provide for the exercise of *any* discretion, a momentous deviation from the plan's terms and one that would greatly defuse employers' incentives to establish and operate such plans.

Petitioners make further misstatements. Because T&B's terminating manager gave *any* consideration to the Company's business interests, Petitioners say, it means that it acted with "total disregard" for the Petitioners. In this case, 35 out of 200 employees who were employed at the Company's Electrical Division headquarters were designated to be key to the Company and their jobs were to be relocated. In making its decision the terminating manager's determination of the importance of this group of engineers was undisputed and the expression of need for Petitioners was genuine (App. B at 24a). Although Petitioners label the determination to be "heavy-handed," this determination was made out of an undisputed perception of necessity, (App. B at 21-22a, n.5), accompanied, as the court noted, by the Company's offer of not only continued employment and benefits, but significant incentives in connection with the relocation. (App. B at 26a).

The determination was hardly to achieve pecuniary gain. Not only did T&B offer these incentives to Petitioners, it also paid severance to over 150 employees who did not relocate and who the Company believed it did not absolutely have to retain. Petitioners received their pension, plus an opportunity to work in transition.

Petitioners' positions did not change and their functions and duties were to remain exactly the same. There

was no proof – indeed there were no allegations – that the conditions at their relocated position would be any different and certainly none that these conditions would be intolerable. The Third Circuit recognized that the Company had "in no sense established oppressive or intolerable conditions" and was not an "uncaring employer." (App. B at 26). And, of course, as the Third Circuit noted, there was no proof or evidence that the Company had pretextual motives or was acting in a discriminatory manner. *Ibid.*

REASONS FOR DENYING THE WRIT

Petitioners' heavily fact-laden claim that the court below erred does not warrant review. The decision below was a plainly correct application of settled law, and – contrary to Petitioners' wrongful characterization – there is no conflict among the Circuits or with the rulings of this Court.

It is well-established by this Court that the courts will develop a "federal common law of rights and obligations under ERISA-regulated plans." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); *Pilot Life Ins. Co. v. Dendeaux*, 481 U.S. 41 (1987). In creating this body of law the Circuit Courts and this Court have all held that a Company can *structure* a plan in any way it sees fit; ERISA mandates no minimum substantive content for employee welfare benefit plans. *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996); *Shaw v. Delta Air Lines*, 463 U.S. 85, 91 (1983); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981); *McGath v. Auto-Body North Shore*, 7 F.3d 665

(7th Cir. 1993); *McGann v. H&H Music Co.*, 946 F.2d 401 (5th Cir. 1991) *cert. denied sub nom. Greenberg v. H&H Music Co.*, 506 U.S. 981 (1992).

The courts have also universally ruled that companies, acting as settlors, may write plans with wide discretion for management to make determinations affecting "who is entitled to receive plan benefits and in what amounts, or how such benefits are calculated." *E.g., Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 119 S. Ct. 755, 763 (1999); *Alessi*, 451 U.S. at 511; *McNab v. General Motors Corp.*, 162 F.3d 959 (7th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S. Ct. 1762 (1999); *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279 (3rd Cir. 1988).

As Petitioners have acknowledged, there is virtual unanimity among circuit court opinions that, where an employer initially *structures* a welfare benefit plan, or, when it later amends the plan, the employer is not acting as a fiduciary. *See, e.g., Hughes Aircraft*, 525 U.S. 432, 119 S. Ct. at 765 (fiduciary duty not implicated where employer determines the structure of Plan); *Curtis-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995) (under ERISA employers "are free for any reason at any time, to adopt, modify, or terminate welfare benefit plans"); *Joanou v. Coca-Cola Co.*, 26 F.3d 96 (9th Cir. 1993); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1162 (3rd Cir. 1990) ("employer's decision to amend or terminate employee benefit plan is unconstrained by fiduciary duties"); *Adams v. Avondale Industries, Inc.*, 905 F.2d 943, (6th Cir. 1990) (employers not subject to fiduciary standards when amending welfare benefits plan); *Hickman v. Tosco Corp.*, 840 F.2d 564 (8th Cir. 1988); *Sengpiel v. B.F. Goodrich Co.*, 156 F.3d 660, 665 (6th Cir. 1998) (transfer of retiree's

welfare benefits not subject to fiduciary standards because transfer more analogous to amending than administering); *Izzarelli v. Rexene Products Co.*, 24 F.3d 1506 (5th Cir. 1994); *Johnson v. Georgia Pacific*, 19 F.3d 1184, 1188 (7th Cir. 1994) (promulgating and implementing amendment accelerating vesting of pension for employees upon changes of corporate control without adjusting retirees' benefits, not fiduciary act); *Belade v. ITT Corp.*, 909 F.2d 736, 738 (2nd Cir.1990) (design of employee benefit plan is strictly a business decision and does not give rise to any fiduciary duties under ERISA); *Dzinglski v. Weirton Steel*, 875 F.2d 1075, 1078 (4th Cir.), *cert. denied*, 493 U.S. 919 (1989) ("Congress left employers much discretion in designing their plans under ERISA and in determining the level and conditions of benefits").[3]

Because a company's creation of a plan and its contents is not a fiduciary matter, companies are free to employ standards that leave matters that are inherently business decisions to the unfettered discretion of company managers. In these situations the courts have held that a committee or administrator would have no business making such a determination. *Spink*, 517 U.S. 882 (1996); *Belade*, 905 F.2d at 738; *Hlinka*, 863 F.2d at 283. In this case, the manager's determination that the Company's election to relocate required retention of key

---

[3] This is not a case brought against any person or entity for violating fiduciary duties; this is a case brought under 29 U.S.C. § 1132(a)(1). The liability of fiduciaries is governed by 29 U.S.C. § 1109 and accrues only to the plan itself, not to participants suing in their individual capacities. *Hozier*, 908 F.2d at 1162, n.7 (3rd Cir. 1990).

engineering personnel was a business decision that was properly left to management. As the court stated in *Hlinka*: "ERISA was not intended to preclude employers from exercising their business and economic savvy for the interests of the pension plan as well as the interests of the employer." *Id.; see Sengpiel*, 156 F.3d at 666 (fact that employer, in order to effectuate corporate reorganization, randomly assigned employees to spin off division that reduced benefits, not breach of fiduciary duty).

This rationale has been consistently applied by the Circuits. *McNab*, 162 F.3d 959 (using court instead of employer as arbiter of program "would compromise the discretionary nature of the program"); *Holliday v. Xerox Corp.*, 732 F.2d 548 (6th Cir. 1984), *cert. denied*, 469 U.S. 917 (1985); *Trenton v. Scott Paper Co.*, 832 F.2d 806 (3rd Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988) ("it defies common sense to suggest that a corporation must allow a retirement board [instead of corporate management] to make personnel decisions such as determining which plants need fewer employees.")

The determination that severance would be paid when the manager deemed it appropriate was a determination that the Company, acting as settlor, had *structured* into the plan.[4] It is a reservation that is "part of the written promise and a limitation upon it." *Hamilton*, 945 F.2d at 78.

---

[4] The Court of Appeals also seriously questioned whether there were any "involuntary terminations" to even cause this plan to apply. These Third Circuit plenary rulings strongly suggest that the severance policy was inapplicable because, as a matter of law, the policy applied only to *involuntary* terminations.

In these contexts, the statute and the court decisions characterize the employer as a trust settlor, with all concomitant rights and privileges given to such a person, or entity. *E.g., Spink*, 517 U.S. at 891 (1996); *Walling v. Brady*, 125 F.3d 114, 120 (3rd Cir. 1997); *McGath*, 7 F.3d 665; *see Siskind v. Sperry Retirement Program, Unisys*, 47 F.3d 498, 506 (3rd Cir. 1995) (employer considered "participant" in single employer plan); *Blaw Knox Retirement Plan v. White Consolidated Industries, Inc.*, 998 F.2d 1185 (3rd Cir.) *cert. denied sub nom. White Consolidated Industries, Inc. v. Pension Ben. Guaranty Corp.*, 510 U.S. 1042 (1993).

Petitioners concede that an employer is *not* acting as an ERISA fiduciary in exercising its right to design or amend a welfare benefit plan, (Pet. Br. at 9), but insist that carrying out the provisions built into the design is "administration." But management's exercise of plan-furnished discretion is not an administration issue. This Court and the Circuits are unanimous; whether the plan is being amended or whether it involves the original structuring of the plan, these activities are not acts of administration within the meaning of ERISA. If the structure designs functions of business discretion into the plan that are not fiduciary in character, then exercising those functions is not an act of administration. *Hughes Aircraft*, 119 S. Ct. at 764; *Systems Council EM-3 v. AT&T Corp.*, 159 F.3d 1376 (D.C. Cir. 1988); *McNab*, 162 F.3d at 959; *Sengpiel*, 156 F.3d at 666; *Izzarelli*, 24 F.3d at 1524; *Nazay v. Miller*, 949 F.2d 1323 (3rd Cir. 1991); *Berger v. Edgewater Steel Corp.*, 911 F.2d 911 (3rd Cir., 1990), *cert. denied*, 499 U.S. 920 (1990); *Dzinglski*, 875 F.2d at 1080; *Hickman*, 840 F.2d at 567; *Morse v. Stanley*, 732 F.2d 1139 (2nd Cir. 1984);

Jones v. AT&T Co., 798 F. Supp. 1137, 1145 (E.D.Pa.), *aff'd*, 981 F.2d 1247 (3rd Cir. 1992).

In this case, Petitioners' contention – that T&B's manager, in exercising his discretion had to evaluate the employees' *personal* views and desires and subordinate, if not *suppress*, the Company's business objectives and the welfare of *all* the employees, plan beneficiaries, and stockholders – is totally out of touch with reality and with Congress' avowed objectives in keeping these plans flexible. In *Hozier*, the Third Circuit, in an analogous fact situation, recognized that if every company decision to modify a plan constituted "plan administration," all those decisions would have to be made *solely* with the interests of covered employees in mind, and it would be "virtually impossible to see how any decision could pass muster." 908 F.2d at 1159; *see also Nazay*, 949 F.2d at 1330. That situation, the Court said, would be unacceptable and wholly *out* of keeping with ERISA's objectives. *Id.*; *see Siskind*, 47 F.3d at 500 (court concluded that benefit plan would not have been adopted if company's personnel-selection discretion built into plan was eliminated or restricted). Petitioners concede that the company could *amend* its plan at anytime to allow management to withhold severance from key personnel who do not relocate; it is untenable, then, to contend that the Company could not do just that if it were done as a *determination* under a plan with broad discretion.

Business decisions can be made notwithstanding their collateral effect on contingent employee benefits. *E.g.*, *Sengpiel*, at 666; *Dzinglski*, 875 F.2d at 1079; similarly, decisions implementing provisions of a benefit plan can

have incidental, and thus legitimate, benefits to the company, *Hughes*, 119 S. Ct. at 764.

The Supreme Court, and every Circuit that has addressed this issue, have determined that an employer's implementation of discretion given by the plan to make eligibility determinations that are "business in nature" are not reviewable under ERISA's fiduciary criteria, *e.g.*, *Spink*, 517 U.S. at 893; *Ames v. American Nat. Can Co.*, 170 F.3d 751 (7th Cir. 1999); *Walling*, 125 F.3d 114; *Siskind*, 47 F.3d at 506; *Adams v. Avondale Industries, Inc.*, 905 F.2d 943 (6th Cir. 1990); *Dzinglski*, 875 F.2d at 1078; *Berger*, 911 F.2d at 918-19. *Young v. Standard Oil (Indiana)*, 845 F.2d 1039 (7th Cir.), *cert. denied*, 488 U.S. 981 (1988). As the Court stated in *McNab*, "[I]f it is lawful to adopt a plan that gives discretion to senior managers, it must be lawful to *use* that discretion to evaluate what the 'best interests' of a firm are." 162 F.2d at 962 (emphasis in original).

When the plan's structure grants discretion to management to make eligibility decisions allowed for by the plan, the Third Circuit and other Circuits are consistent; they have determined that exercising that discretion is a business decision and not subject to fiduciary standards. *McNab*, 162 F.3d at 960 (nothing violates ERISA law in *adopting* or implementing plan that "leave[s] participation to the discretion of managers" or by uses more flexible *standards* instead of *rules*); *Sengpiel*, 156 F.3d at 666 (implementation not a fiduciary act of administration); *Walling*, 125 F.3d at 120 (since trustees, as settlors, "were free to scrap the plan altogether, they were free to advance non-pension fund interests in making design changes to it"); *Siskind*, 47 F.3d at 501 (refusing manager right to exercise discretion reserved to determine eligibility would have

"effectively eliminat[ed] the program's personnel-selecting objective without which the program would not have been adopted in the first place"); *Nazay*, 949 F.2d at 1329 (employer's determination that employee's failure to obtain treatment certification warranted a penalty was proper because discretion *built into* the plan); *Hamilton*, 945 F.2d at 78 (company permitted to *implement* reservation that employer had structured in plan); *Adams v. LTV Steel Corp.*, 936 F.2d 368, 370-71 (8th Cir. 1991) (company acted as an employer and not as a fiduciary in deciding whether the employee's early retirements were "in the company's interests"); *Belade*, 909 F.2d at 738 (management's decision to deny benefits to advanced technology department was not breach of ERISA's fiduciary obligations because plan structured to allow management to designate *which* of the headquarters departments would be eligible); *Dzinglski*, 875 F.2d at 1075 (plan that shifted the "effective decision to deny benefits" from plan fiduciary to the company upheld); *Hlinka*, 863 F.2d at 284 (company management could deny early retirement to plaintiff because of his "extensive and unique technological expertise"); *Scott Paper*, 832 F.2d at 809 (employer applied discretion to distinguish "overstaffed" plants from "lean" plants). Petitioners have cited no Circuit decisions to the contrary.

In these cases, the courts have recognized that where the plan's terms grant to management, not the administrator, the right to determine whether benefits should be paid, the administrator has no discretion and must abide by management's determination. Accordingly, the administrator's action is not a fiduciary matter. *Siskind*, 47 F.3d at 507 (Committee had "duty" to accept management's

recommendation); *Averhart v. U.S. West Management Pension Plan*, 46 F.3d 1480, 1488 (10th Cir. 1994) ("decision to pay benefits to some inactive employees but not others . . . was a matter of plan design not subject to ERISA's fiduciary standards"); *Adams v. LTV Steel*, 936 F.2d at 370 (LTV "acted as an employer, not a fiduciary in deciding whether the employees' early retirements were in the company's interest"); *Berger*, 911 F.2d at 918 (company "acting in its capacity as employer and not as a fiduciary under ERISA" when it determined that payment of benefit not "mutually satisfactory"); *Dzinglski*, 875 F.2d at 1080 (plan does not permit Retirement Committee to "examine Weirton's decision," nor authorize Committee "to determine Weirton's interest, only to ascertain Weirton's assent"); *Hlinka*, 863 F.2d at 286 (administration had no authority to override management's business decision to deny employee's early retirement benefit because of his extensive technological experience).

Indeed, Petitioners *concede* that in the cases cited as precedent by the Third Circuit the administrators *would* have breached their duties *if they had not followed the manager's determination*. (Pet. Br. at 11). However, Petitioners contend that in those cases the plans *expressly* required the managers to put "the employer's business interests first." The argument is spurious. First of all, the criteria used in all these cases was broad and flexible. A determination by the President of the Company that it is appropriate to retain and relocate key technical personnel and not to use the benefit to discourage such action is certainly not dissimilar from a standard of "best interests." Second, the criteria used in this plan is the equivalent of the general criteria used in plans upheld in a

string of Court of Appeals cases. *Murphy v. International Bus. Machines*, 23 F.3d 719 (2nd Cir.), *cert. denied*, 513 U.S. 876 (1994) (upholding denial of exit-incentive benefits to employees considered its "critical resources" where plan gave discretionary authority to company to determine eligibility); *Dzinglski*, 875 F.2d at 1076 (benefit not payable if Company determines "suitable long term employment" exists); *Hamilton*, 945 F.2d at 77 (company reserved right to alter, reduce, or eliminate benefit, individually or generally); *Berger*, 911 F.2d at 914 (in Company's "interest"); *Bair v. General Motors Corp.*, 895 F.2d 1094, 1097 (6th Cir. 1990) (employee's participation in special retirement program determined "only if [GM] management first decides to permit [participation]"); *McNab v. General Motors Corp.*, 987 F. Supp. 1115, 1119 (S.D.Ind. 1997), *aff'd*, 162 F.3d 959 (ad hoc determination by management committee that employees "needed to continue the operation, pending sale of the unit to another company.")

Furthermore, as the Court said in *McNab*, there is nothing wrong under ERISA in giving a company discretion to award or withhold benefits based on the perceptions of managers. 162 F.3d at 961. As was said in *McNab*:

> Flexibility is doubtless the reason GM adopted a standard rather than a rule; flexible administration therefore cannot be the program's undoing, or we have simply used an under-the-table method to make discretion unlawful, contradicting the conclusion that ERISA permits discretionary plans.

Id. at 962.

Petitioners' contention that the criteria for applying discretion be pinpointed is inconsistent with a long line

of precedent that supports and reinforces ERISA's objective of maintaining this objective of flexibility, *e.g.*, *Administrative Committee v. Robinson*, 164 F.3d 981 (6th Cir. 1999) (limiting discretion to only terms explicitly defined would undermine the plan's discretionary powers or "require companies to write interminably long plans . . . "); *McNab*, 162 F.3d 959 (ad hoc determination by committee); *Sengpiel*, 156 F.3d at 663 (random selection); *Adams v. LTV Steel*, 936 F.2d at 369 ("mutually satisfactory conditions"); *Adams v. Avondale Industries, Inc.*, 905 F.2d at 945 (ad hoc determination of need for employees in pending sale of division); *Berger*, 911 F.2d at 918 (company's early retirement and severance benefits plan implemented only for persons whose departure was in parties' "mutual interest"); *Hlinka*, 863 F.2d at 283 (in either party's "interest").

Petitioners cite *Anderson v. Ciba-Geigy*, 759 F.2d 1518 (11th Cir.) *cert. denied*, 474 U.S. 995 (1985) to support their contention that T&B's decision was subject to fiduciary standards. That case provides no support for that proposition. In *Anderson*, the severance plan was structured to allow a management committee to use its discretion to determine when "special situations" existed precluding application of its severance policy (even where employees were not terminated for cause). It did, and the *court upheld the determination*. The court held that the employer's determination was not for any pretextual reason.

Likewise, in the instant case, there was an exercise of discretion and the Third Circuit found it was not pretextual. Indeed, The Third Circuit found that the Company's actions in light of its "unassailable business decision" to

move was sincere and reasonable. Petitioners' reference to *Anderson's* statement on "administration" is taken wholly out of context. Plaintiffs there had contended that the manager exercising the discretion was not authorized to implement the decision because he was not a named member of the management committee. The court found that he had been orally delegated the duties of a fiduciary. The court did not rule on whether his exercise of the duties was a fiduciary act subject to 29 U.S.C. § 1104, only that it was enforcible because it was "not done in bad faith." 759 F.2d at 1522.

Petitioners also contend that the manager, Kevin Dunnigan, was acting under a conflict of interest that caused him to resolve the conflict by ignoring participants. There was no conflict of interest that ERISA did not contemplate and permit. First, the plan was structured so that the terminating manager's broad discretion was an integral part of the benefit. *See, e.g., Hamilton*, 945 F.2d at 77. Second, Mr. Dunnigan did not "ignore" participants; while he was motivated to keep the engineers with the Company with incentives to prevent a wholesale exodus of that staff, those objectives served the interest of many other participants of the plan, including the employees and other personnel who relied upon those engineers to maintain the technical capacity of the Company to assist them in their work.

Even if a conflict is a factor, which it was not, courts have consistently held that management does not violate ERISA laws when it takes a course of action which reasonably best promotes the interest of all the plan participants, simply because it benefits the company, *e.g., Spink*, 517 U.S. at 893; *Fletcher v. Kroger Co.*, 942 F.2d 1137, 1140

(7th Cir. 1991); *Morse*, 732 F.2d 1139. ERISA requires that the plan be maintained with an eye toward the best interests of the collective body of participants and beneficiaries, not just one individual employee. *Siskind*, 47 F.3d at 507 (company viewed as participant that shares employees' interest in maintaining financial security); *Izzarelli*, 24 F.3d at 1523. Therefore, it is perfectly proper to consider the impact payment of benefits will have on the remaining participants and and *all* the beneficiaries. *Woolsey v. Marion Laboratories*, 934 F.2d 1452, 1458 (10th Cir. 1991); *Severs v. Allied Constr. Services Inc.*, 795 F.2d 649 (8th Cir. 1986) (conditioning payments on covenants not to compete fulfilled employer's duty to all participants to preserve and maintain the plan).

CONCLUSION

For the reasons given above, Respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

PAUL Z. LEWIS
Counsel of Record
LEWIS & MCKENNA
Attorneys for Respondents
82 E. Allendale Road
Saddle River NJ 07458
(201) 934-9800